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1953

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING

HOUSE OF LORDS

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

AND

PEERAGE CASES

◆

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1953

MEMORANDA

1952.

Dec. 25. *This day* THE RIGHT HON. SIR PAUL OGDEN LAWRENCE, *sometime a Lord Justice of Appeal, died, aged* 91.

1953.

Jan. 11. THE HON. SIR FRED EILLS PRITCHARD, *a Justice of Her Majesty's High Court of Justice, Queen's Bench Division, retired.*

Jan. 12. HILDRETH GLYN-JONES, ESQ., Q.C., *was appointed to be one of the Justices of Her Majesty's High Court of Justice, Queen's Bench Division, in place of Mr. Justice Pritchard, and was afterwards Knighted.*

Jan. 29. ALBERT DENIS GERRARD, ESQ., Q.C., *was appointed to be one of the Justices of Her Majesty's High Court of Justice, Queen's Bench Division, and was afterwards Knighted.*

Oct. 5. THE RIGHT HON. BARON NORMAND OF ABERDOUR, *a Lord of Appeal in Ordinary (sometime Lord Justice General of Scotland and Lord President of the Court of Session), retired.*

Nov. 4. THE HON. LORD KEITH, *one of the Senators of the College of Justice in Scotland, was appointed to be a Lord of Appeal in Ordinary, in place of Lord Normand, retired, and was granted the dignity of a Baron of the United Kingdom by the name, style and title of Baron Keith of Avonholm.*

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1953, will be as follows:—

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Aff. affirmed
Appl. applied
Appr. approved
C. considered
D. disapproved
Dist. distinguished
E. explained
F. followed
N.F. not followed
O. overruled
Q. questioned
R. referred to in judgment
Rev. reversed

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1867

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1871

British North America Act, 1871 (34 *&* 35 *Vict. c.* 28), *s.* 2 - - **J.C. 594**

1894

Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 2 (1) (*b*); *s.* 7 (7) - **H.L.(E.) 267**

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1921

Finance Act, 1921 (11 *&* 12 *Geo.* 5, *c.* 32), *s.* 30 (1) (*c*), (3) - **H.L.(Sc.) 380**

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1927

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1936

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1937

Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *ss.* 25 (1), 26 - **H.L.(E.) 643**

1940

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1947

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Town and Country Planning Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *s.* 78 (1). **H.L.(E.) 535**

Transport Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 49), *s.* 47 (3) - - - **H.L.(Sc.) 337**

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Equity Act (No. 24 *of* 1901*–No.* 41 *of* 1947), *N. S. W., ss.* 82, 84 - - **J.C. 52**

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Testator's Family Maintenance and Guardianship of Infants Act (No. 41 *of* 1916—*No.* 30 *of* 1938) *N.S.W., s.* 3 (1) **J.C. 52**

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1908

Dominion Lands Act, 1908, *c.* 20, *s.* 76 (*k*) **J.C. 420**

1930

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1948

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1949

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Indian and Pakistani Residents (Citizenship) Act, No. 3 *of* 1949 - - **J.C. 514**

STATUTORY RULES, ORDERS AND INSTRUMENTS JUDICIALLY CONSIDERED

Metalliferous Mines General Regulations, 1938 (*S.R. & O.* 1938, *No.* 630, *as amended by S.R. & O.* 1945, *No.* 1351), *regs.* 7 (3), 14 (1) *and* (7) *and* 15 (1) (2) (3) *and* (10). - **H.L.(E.) 663**

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Letters Patent Incorporating the Canadian Pacific Railway Company, February 16, 1881, *cl.* 4 - - - **J.C. 618**

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Ceylon (Constitution and Independence) Order in Council 1946 *as amended to* 1947, *s.* 29 (2) (*b*) - - - - **J.C. 514**

Customs Ordinance (Legislative Enactments of Ceylon, 1938, *c.* 185), *ss.* 17, 22, 47, 108 - - - - **J.C. 461**

Marriage and Divorce (Muslim) Ordinance, No. 27 *of* 1929, *as amended by No.* 9 *of* 1934 (*Legislative Enactments of Ceylon*, 1938, *c.* 99), *s.* 50 **J.C. 285**

Motor Car Ordinance, No. 45 *of* 1938, *ss.* 133, 134 - - - - - **J.C. 584**

Penal Code (Legislative Enactments of Ceylon, 1938, *c.* 15), *s.* 294 - **J.C. 200**

Penal Code of Ceylon, R.S. 1938, *c.* 15, *ss.* 389, 392 - - - - **J.C. 407**

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Control of Rent Ordinance, No. 25 *of* 1947, *s.* 14 (1) (*m*) - - - **J.C. 632**

TRINIDAD AND TOBAGO

Immigration (Restriction) Ordinance, 1936 (*as amended in* 1943) (*c.* 20, *No.* 2) *s.* 4 (1) (*h*) - - - - **J.C. 530**

Interpretation Ordinance (*c.* 1, *No.* 2), *s.* 19. **J.C. 530**

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Native Courts (Colony) Ordinance, No. 22 *of* 1944, *s.* 3 - - - - **J.C. 164**

Native Courts (Colony) Procedure Regulations No. 10 *of* 1945, *reg.* 40 - **J.C. 164**

West African Court of Appeal Ordinance, Laws of Nigeria, 1948 *Rev.*, *c.* 229, *s.* 10 - - - - **J.C. 327**

Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

THE JUDICIAL COMMITTEE

OF

HER MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL

J. C.*
1952
Oct. 6.

ARUMUGAM NAGALINGAM OF POLIKANDY . . . . APPELLANT;

AND

ARUMUGAM THANABALASINGHAM AND OTHERS . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Ceylon—Roman-Dutch law—Gift—Acceptance—Validity—Fidei commissum—Jus accrescendi.

A maternal uncle is not a natural guardian of his minor nephew—in the strict sense he is not even a member of the same family—and in the absence of appointment by lawful authority to act for him, an acceptance by the uncle of a gift of property on behalf of the minor is invalid according to Roman-Dutch law in Ceylon.

Silva v. *Silva* (1908) 11 C.N.L.R. 161, *Avichchi Chetty* v. *Fonseka* (1905) 3 A.C.R. 4, and *Cornelis* v. *Dharmawardene* (1907) 2 A.C.R.Supp. xiii, applied.

Where a deed of gift of property by parents to one of their sons, subject to reservations of life interests to themselves and a

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* *Present*: LORD PORTER, LORD TUCKER, LORD COHEN, THE CHIEF JUSTICE OF CANADA (RT. HON. T. RINFRET) and SIR LIONEL LEACH.

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fidei commissum for the benefit of their other three sons, directed that on the death of the donee the property should, subject to the life interests reserved to the donors, devolve on the other sons " in equal shares," the gift was not one of a disposition of one share of the whole to each of the three brothers, but a gift of the whole to the three brothers jointly with benefit of survivorship.

Tillekeratne v. *Abeyesekere* (1897) 2 C.N.L.R. 313 applied.

Judgment of the Supreme Court of Ceylon (1948) 50 C.N.L.R. 97 reversed.

APPEAL (No. 24 of 1951), by special leave, from a judgment of the Supreme Court of Ceylon (October 13, 1948), which allowed an appeal by the present second, third and fourth respondents from a decree of the District Court of Jaffna (March 7, 1947), and dismissed a cross-appeal by the present appellant.

The following facts are taken from the judgment of the Judicial Committee:—The action out of which the appeals to the Supreme Court arose was instituted by the appellant for a declaration that certain land situate at Polikandy was the common property of himself and the first respondent and for an order for partition. The first respondent was a brother of the appellant. At the commencement of the proceedings he was the only defendant and he accepted the averments contained in the plaint. The second, third and fourth respondents were the sons of a deceased brother named Kanthavanam (or Kandavanam). They applied to be made parties and were joined as the second, third and fourth defendants respectively. They are hereafter referred to as the contesting respondents. They denied the validity of the claim advanced by the appellant and contended that the title to the land was in them. It had, they said, belonged to their father and had devolved on them on his death.

In the course of the proceedings in the District Court certain other intervenients were allowed to appear in support of a claim that a small portion of the property belonged to them, but the District Judge decided that they had no interest in the land, and they pressed the matter no further. The subject-matter of the appeal was, therefore, the full parcel of land described in the schedule to the plaint.

The property was acquired in 1882 by Koolyar Arumugam, the father of the appellant and the first respondent. By his wife Walliammai, Koolyar Arumugam had four sons, the other two sons being Poopalasingham, who died without issue on August 3, 1917, and Kanthavanam, the father of the contesting respondents, who died on July 15, 1931. Koolyar Arumugam died in 1920, and his wife in 1929.

The main question in the appeal involved the consideration of three deeds to which Koolyar Arumugam and Walliammai were parties. The first of those deeds was dated April 1, 1896, under which they purported to convey to Kanthavanam by way of gift the land in suit and other parcels, subject to the reservation of certain of the produce to themselves during their lifetime. In the District Court that deed was marked as exhibit P4. At the time of the execution of exhibit P4 Kanthavanam was a minor. According to his death certificate he would be 11 years of age, but according to his marriage certificate he would be 18 years old. The Supreme Court accepted his age to be about 18 years, and there had been no criticism of that finding. In Ceylon the age of majority was 21 years.

Under Roman-Dutch law, the law of Ceylon, a gift to be valid required a valid acceptance. Being a minor Kandavanam did not sign exhibit P4. It was signed by his maternal uncle Kanthar Sinnathamby, who, according to a statement in the deed, did so in acceptance of the donation for and on behalf of his nephew. The appellant contended that that did not constitute a valid acceptance and consequently no title to the property passed to Kanthavanam. In the alternative, he said that it was revoked by the two later deeds. On the other hand, the second, third and fourth respondents maintained that exhibit P4 constituted a valid deed of gift, which had not been affected by any subsequent action on the part of the donors.

The second deed was dated July 6, 1908, and was marked as exhibit P5. By that deed Koolyar Arumugam and Walliammai purported to revoke exhibit P4, and their reasons for doing so were given in the following recitals: "Whereas we have executed a "donation deed in favour of our son Arumugam Kanthavanam "of Polikandy, bearing No. 5825 dated April 1, 1896, and "attested by Eramalingar Arumugam, notary, for the under-"mentioned nine properties, and whereas the said Kanthavanam "was then a minor and whereas his uncle Kanthar Sinnathamby "of Polikandy had only accepted the said deed for and on his "behalf and whereas we are possessing and using the said "properties according to the said deed and whereas the said "Kanthavanam had without our consent married one, among "others, who is not of our caste, and whereas the wife of the "said Kanthavanam and her people are our bitter enemies and "ungrateful to us and whereas we think that the said Kantha-"vanam would during our lifetime ruin the said properties and "whereas the said properties should be donated to the said

"Kanthavanam himself subject to fidei commissum and "whereas the said Kanthavanam has full mind and perfect "desire to accept such kind of donation."

Exhibit P5 was not signed by Kanthavanam. Having executed exhibit P5, Koolyar Arumugam and Walliammai proceeded on the same day to execute in favour of Kanthavanam a new deed of gift of the properties covered by exhibit P4, subject to reservations of life interests to themselves and a fidei commissum for the benefit of the appellant, the first respondent and Poopalasingham. The original of that deed, which was registered, was said to have been lost, but a certified copy was put in evidence and marked exhibit P6. It was alleged by the appellant that the original exhibit P6 was signed by Kanthavanam. Immediately preceding the witness clause was this statement: "I the said Kanthavanam the donee hereof do peace-"fully accept this donation subject to the aforesaid findings." It was also said that the deed was executed in duplicate. The alleged duplicate copy, purporting to bear the signature of Kanthavanam, was also put in evidence, being marked exhibit P6A. Although the execution of exhibits P5 and P6 by Koolyar Arumugam and Walliammai was not now in question, the contesting respondents denied that Kanthavanam signed exhibit P6 and said that the alleged signature on exhibit P6A was a forgery.

The District Judge (G. C. T. A. De Silva A.D.J.) held that the appellant and the first respondent were each entitled to a four-ninth share in the property and the contesting respondents jointly to the remaining one-ninth, although they had not made any such claim in the alternative. He left the parties to bear their own costs. The Supreme Court (Canekeratne and Dias JJ.) held that the contesting respondents were entitled to the land to the complete exclusion of the appellant and the first respondent, and consequently allowed their appeal with costs. The appellant now asked for the restoration of the findings of the District Judge, except as regards the one-ninth share allotted to the contesting respondents. He maintained that he was entitled in full to the reliefs claimed in his plaint and to his costs throughout.

1952. June 25, 26, 30; July 1. *Stephen Chapman* for the appellant. The fundamental question in this appeal turns on the effect in law of the three deeds, exhibits P4, P5 and P6, and in particular of P4 and P6; the execution of the latter was strongly contested. It is submitted, first, that P4 was invalid for want of a valid acceptance. The important matter in relation to Roman-Dutch law is that a donation takes on to a considerable extent the character of a contract. It is always classified in Roman-Dutch law as an agreement. There is no necessity for consideration. The importance of the contractual character is that a donation must be accepted by the donee; the other matter of importance is that where the donee is a minor under the age of puberty, acceptance must be made on his behalf by his legal guardian. In this case the purported acceptance on behalf of the minor by his maternal uncle, who, not being his legal guardian, had no authority to do so, was invalid. Intention to make the gift cannot affect the question whether there was a valid acceptance. Once, as here, a particular form of express acceptance has been used, there is no basis for implication of acceptance from various acts which might otherwise be relied on as acceptance. [On the question of acceptance reference was made to *Government Agent, Southern Province* v. *Karolis*,[1] *Silva* v. *Silva*,[2] and to Maasdorp, Institutes of Cape Law, Vol. 3, Bk. 3, Chap. 7.]

The second point—which is in a small compass—is that P4, even if valid, was validly revoked with the assent of the donee by P5, and P6 was, as found by the District Judge, a valid deed validly executed. Thirdly, with regard to the fidei commissum in P6 for the benefit of the appellant, the first respondent and the deceased brother, the position was that Kanthavanam, the heir, was the fidei commissary, and had full dominion over the property; he was not limited in any way except as to power of disposal. He was under an obligation when he died, or any other specified event had occurred, to pass the property on to the next person or persons directed to take it, who were the fidei commissaries. There may be a succession of fidei commissaries: the Roman-Dutch law limits it to four generations; and it usually takes the form that the property shall not go out of the family. In this case no question arises as to the validity of the fidei commissum. Poopalasingham having died before any vested interest arose, he was out of the picture. Where there are three persons who have vested interests, questions of difficulty arise whether it is a single fidei commissum of a single property, or whether there are three separate fidei commissa of three separate rights in the property. Where it is one fidei commissum, on the death of one of the three persons his interest passes to the survivors under the principle of jus accrescendi. But if there are

[1] (1896) 2 C.N.L.R. 72.

[2] (1908) 11 C.N.L.R. 161.

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three separate fidei commissa, and three separate fidei commissaries, then there has to be a partition, and their heirs would come in under each separate fidei commissum. [Reference was made to Maasdorp, Institutes of Cape Law, 6th ed., Bk. 1, Chap. 20.] In this case under P6 the property passed in equal shares to the appellant and the first respondent on the death of Kanthavanam.

J. Comyn for the second, third and fourth respondents. For the appellant to succeed he must show, first, that P4 was invalid for want of acceptance, and secondly, in addition, that P6 was valid. In other words, to get to P6 he must clear away P4. It is submitted that P4 was valid and was validly accepted; that P5 was invalid and of no effect and did not revoke P4, if only because it was the unilateral act of the donors, the father of the respondents, Kanthavanam, not having been a party to it and not having approved of or consented to it. The findings of the Supreme Court as to the validity of P4 and the invalidity of P5 render it unnecessary to consider any question as to P6 and are conclusive of the whole case. In any event, the appellant did not discharge the burden of proof on him as to the execution of P6. In so far as it may be necessary to consider the effect of P6 the contention for the appellant that he and the first respondent were entitled under it to the whole of the property was wrong.

There is a natural presumption that the gift was accepted: "Acceptance will be presumed when there are circumstances to "justify such presumption": *Government Agent, Southern Province* v. *Karolis.*[3] The like view has been expressed in a number of cases: *Bindua* v. *Untty*,[4] where it was said that "it is quite clear that by the Roman-Dutch law acceptance "may be manifested in any way in which assent may be given "or indicated"; *Nagaratnam* v. *Kandiah*[5]; *Hendrick* v. *Sudritaratne*,[6] on which strong reliance is placed; *Babaihamy* v. *Marcinahamy*[7]; *Silva* v. *Silva*[8]; and *Senanayeke* v. *Dissanayeke*,[9] where again it is reiterated that "it is not essential "that the acceptance to a deed of gift should appear on the "face of it, such acceptance may be inferred from circum"stances." On P4, the cases show that the court leans strongly towards presuming acceptance on the part of minors of a gift—

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[3] 2 C.N.L.R. 72.
[4] (1910) 13 C.N.L.R. 259, 260.
[5] (1943) 44 C.N.L.R. 350.
[6] (1912) 3 C.A.C. 80.
[7] (1908) 11 C.N.L.R. 232.
[8] 11 C.N.L.R. 161.
[9] (1908) 12 C.N.L.R. 1.

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it is something for their benefit. In searching for the circumstances—use and enjoyment—almost any small act is consistent with acceptance, and is sufficient to raise this presumption, and once it is raised, it is for the other side to show why it does not apply. On the facts of the present case there is every indication of the presumption of acceptance; there is ample evidence here of acceptance.

If the submission about P4 and P5 be right, P6 need not be considered, but if it has to be, it does not amount to revocation; P4 holds the fort. Lastly, there is a bias against jus accrescendi. It was said in *Carlinahamy* v. *Juanis* [10] that in the case of a gift the law will not presume merely from the conjunction of two or more persons in the same liberality, that in the event of one of these predeceasing the vesting of the liberality his share was intended to accrue to the others. Such a result can only arise from operative words which either expressly or by implication have this effect.

Stephen Chapman replied.

October 6. The judgment of their Lordships was delivered by SIR LIONEL LEACH, who stated the facts set out above and continued:—The District Judge did not deem the appellant's evidence worthy of credit, unless corroborated, but he considered that the case could be decided independently of his testimony. He held that exhibit P4 was invalid, because the acceptance was merely the act of a maternal uncle, who had no lawful authority to act for the minor, and therefore the way was open to the donors to execute exhibits P5 and P6. He did not, however, consider the question whether there could be lawful acceptance in any other way, for instance, by conduct. In holding exhibit P4 to be invalid the District Judge relied on the judgment of the Supreme Court in *Silva* v. *Silva*,[11] where it was held that a gift by a father to his minor son and accepted by an uncle on the minor's behalf was invalid for want of lawful acceptance, the uncle not being a natural guardian. In delivering the judgment of the court, Grenier A.J. (Hutchinson C.J. concurring) said that according to Roman-Dutch law only the father, the mother, the grandfather and the grandmother stood in the relationship of natural guardians.

A witness to the signature of exhibit P6 was one Sinnathamby Vallipuram, who stated in evidence that Kanthavanam signed it in his presence, and he identified Kanthavanam's signature on the duplicate copy exhibit P6A. The District Judge saw no reason to disbelieve this witness. He was also impressed by the fact that Kanthavanam, although he must have known of the position, took no steps to challenge the revocation of exhibit P4.

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[10] (1924) 26 C.N.L.R. 129.

[11] 11 C.N.L.R. 161.

The District Judge's decision that the appellant and the first respondent were each entitled to a four-ninth share in the land and the contesting respondents jointly to the remaining one-ninth was based on his opinion that on the death of Poopalasingham his interest in the property devolved on his heirs. To this question their Lordships will return later. Notwithstanding that the contesting respondents had made no claim to such a share, the District Judge considered that it was his duty to examine the title of all the parties and decide the case according to the result of the examination.

The appeals to the Supreme Court were heard by Canekeratne and Dias JJ. The judgment was delivered by Canekeratne J., Dias J. concurring. The judges considered that the reputation of K. Kanthavanam, the notary who had acted in the execution of exhibit P6, was an unsavoury one and they adversely criticized the evidence of Sinnathamby Vallipuram, which the District Judge had accepted, but they did not go to the length of reversing his finding on this question. They left it open on the ground that it was unnecessary to decide whether the donee had executed exhibit P6. They considered that for purposes of acceptance minors could be divided into two classes, infants and those who had attained puberty. One of the second class could be deemed to be capable of thinking for himself and by taking the benefit of the contract could himself accept it. In expressing this opinion the Supreme Court differed from the judgment of Layard C.J. (sitting with Moncreiff J.) in *Wellappu* v. *Mudalihami*,[12] where the Chief Justice said that by the law of Ceylon persons were all either majors or minors, over or under 21 years of age, and it knew nothing of the elaborate distinctions of Roman law, which recognized three stages of non-age, "infancy," "puberty" and "minority."

The Supreme Court came to the conclusion that exhibit P4 constituted a valid deed of gift because Kanthavanam had accepted it by going into possession. The court presumed that this took place shortly after the gift was made, or at least before November 30, 1899, the date of the institution of an action

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[12] (1903) 6 C.N.L.R. 233.

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relating to one of the other parcels of land covered by exhibit P4. In this action the plaintiffs were Koolyar Arumugam and Kanthavanam. The latter, being still a minor, appeared by his father as his next friend. Having found that the gift had been perfected in this way, the Supreme Court held that Kanthavanam's title was unaffected by exhibit P5, because this merely represented the unilateral act of the donors. It was on this footing that the appeal of the contesting respondents was allowed and the cross-appeal of the appellant was dismissed.

Their Lordships see no reason for doubting the correctness of the decision of the District Judge that the maternal uncle's acceptance of the gift on behalf of the minor was not a valid acceptance according to the law of Ceylon. The finding is supported by authority. In addition to the case of *Silva* v. *Silva*,[13] on which the District Judge relied, there are two other decisions of the Supreme Court to the same effect, namely, *Avichchi Chetty* v. *Fonseka*[14] and *Cornelis* v. *Dharmawardene*.[15] A maternal uncle is not a natural guardian; in the strict sense he is not even a member of the same family. Without appointment by lawful authority Kanthar Sinnathamby could not act for Kanthavanam, and it is not suggested that any such appointment existed. Therefore acceptance could spring only from Kanthavanam himself, if there was in fact acceptance.

Their Lordships do not consider that it is necessary to discuss the reasons given by the Supreme Court for holding that there was acceptance of the gift by Kanthavanam, because even if its reasons are sound (and here their Lordships express no opinion) they consider that he must be regarded as being a party to the revocation of exhibit P4. Exhibit P5 in itself obviously could not achieve revocation; Kanthavanam was not a signatory to it. Here the donors acted alone. But exhibit P5 must be read with exhibit P6, and if the latter document was signed by Kanthavanam there can be no doubt that he consented to exhibit P4 being replaced by exhibit P6.

Their Lordships are constrained to hold that Kanthavanam signed exhibit P6. The District Judge accepted the evidence of the witness who deposed to Kanthavanam's signature, and in spite of its criticism the Supreme Court did not say that he was wrong. The judge who sees and hears the witness is in a better position to assess the value of his evidence, as the Board has had reason to point out on numerous occasions, but this does not, of

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[13] 11 C.N.L.R. 161.

[14] (1905) 3 A.C.R. 4.

[15] (1907) 2 A.C.R. Supp. 13.

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course, fetter the discretion of an appellate court in arriving at a contrary conclusion if it considers that there are good reasons for so doing. In the present case their Lordships can find no sufficient reason for rejecting the finding of the District Judge that exhibit P6 was accepted by Kanthavanam and that consequently it was valid in law. It follows that in their Lordships' opinion the Supreme Court erred in holding that the position was governed by exhibit P4 alone.

There remains the question whether by reason of exhibit P6 the contesting respondents are entitled jointly to a one-ninth share in the land, as found by the District Judge. This finding was based on the assumption that exhibit P6 is to be read as creating a separate fidei commissum in favour of each of Kanthavanam's three brothers and not a single fidei commissum in their joint favour. The Supreme Court did not express any decided opinion, beyond indicating that it was a question of interpretation of the particular instrument whether on the death of a fidei commissary there was a jus accresendi in favour of the other fidei commissaries or whether the heirs of the deceased fidei commissary acquired his interest.

The direction in exhibit P6 was that on the death of Kanthavanam the property should, subject to the life interests reserved to the donors, devolve on the other sons " in equal shares." There is room for argument here, but having regard to the judgment of the Board in *Tillekeratne* v. *Abeyesekere*,[16] their Lordships hold that the gift in exhibit P6 is not one of a disposition of one share of the whole to each of the three brothers, but a gift of the whole to the three brothers jointly with benefit of survivorship. It follows that in their Lordships' judgment Poopalasingham's interest, assuming that he had a vested interest when he died, did not devolve upon his heirs, but on his surviving brothers.

The result is that their Lordships will humbly advise Her Majesty to allow the appeal and grant the reliefs claimed by the appellant in his plaint. The appellant is entitled to his costs throughout.

Solicitors: *Darley, Cumberland & Co.; Lee & Pembertons*

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[16] (1897) 2 C.N.L.R. 313.

[HOUSE OF LORDS.]

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Mar. 17, 18,
19, 20, 24,
25, 27, 31;
Apr. 1, 2;
July 11.

GDYNIA AMERYKA LINIE ZEGLUGOWE SPOLKA AKCYJNA . . . . . APPELLANTS;

AND

BOGUSLAWSKI AND ANOTHER . . . RESPONDENTS.

International Law—Polish Government in London from 1940 *to* 1945—*New Polish Government constituted at Lublin on June* 28, 1945—*Recognition of new Polish Government by British Government as from midnight July* 5–6, 1945—*Terms of certificate of recognition—Retroactivity—No de facto control over Polish ships and men in England by new Polish Government.*

According to the terms of a certificate signed by the Foreign Secretary, His Majesty's Government in the United Kingdom recognized the Polish Government established in exile in time of war and having its headquarters in London, as being the Government of Poland up to and including midnight of July 5–6, 1945, and as from that point of time recognized the Polish Provisional Government of National Unity as being the Government of Poland and ceased to recognize the Polish Government in London; but the Foreign Secretary stated in the certificate that the question of the retroactive effect of recognition of a government was a question of law for decision by the courts. The new Polish Government had been formed in Poland on June 28, 1945, and questions arose as to the retroactive effect of its recognition on the validity of the acts of the London Polish Government between that date and midnight July 5–6, 1945, as regarded the Polish merchant fleet and its personnel.

Held, that, even assuming that the recognition of the new Polish Government might date back to June 28 in Poland, where it had effective control, that control did not extend to the old Polish Government in London or to the Polish merchant fleet, and that accordingly as regarded them the operative date of recognition was that stated in the certificate and there was no retroactive effect.

Held, further, that on the true construction of the relevant Polish laws the Minister of Industry, Commerce and Shipping in the old Polish Government had, so long as that Government was recognized, authority to enter into an obligation on behalf of the appellant shipping company to pay certain gratuities to the officers and seamen of the Polish merchant marine, so as to bind it to pay them; that on the evidence he had in fact done so and that accordingly these gratuities were payable.

Guaranty Trust Co. v. *United States* (1938) 304 U.S. 126 considered.

Decision of the Court of Appeal (sub nom. *Boguslawski* v. *Gdynia Ameryka Linie*) [1951] 1 K.B. 162, affirmed.

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* *Present*: LORD PORTER, LORD OAKSEY, LORD MORTON OF HENRYTON, LORD REID and LORD TUCKER.

APPEAL from the Court of Appeal (Bucknill, Denning and Cohen L.JJ.).

The facts, stated by Lord Porter, were as follows:—This was an appeal to the House of Lords from a judgment of the Court of Appeal whereby that court affirmed the judgment entered for the respondents, Jan Boguslawski and Stanislaw Krupka, by Finnemore J. The respondents were plaintiffs and the appellants, Gdynia Ameryka Linie, were defendants in the action, and by Finnemore J.'s judgment it was ordered that the appellants should pay to each of the respondents a sum representing three months' wages alleged to be contractually due to him on his leaving the appellants' employment, or alternatively a like sum as damages for breach of agreement.

The matters in issue arose out of events which took place at the end of June and beginning of July, 1945. At that time it was known that the British Government had it in mind to acknowledge what had hitherto been known as the Lublin Government in Poland. Up till then the exiled Polish Government, which by the invitation and consent of His Majesty's Government was functioning in London, was accepted as the Government of Poland. At midnight of July 5, however, that recognition was withdrawn and the government set up in Warsaw was recognized. The matters in dispute in the appeal were concerned with the effect of that change of recognition, with the time from which it spoke and the territory over which its influence was spread. The period under consideration necessitated the examination of a number of incidents which took place between June 28 and July 7, 1945.

When Poland was overrun by the German forces the Polish Government retired to Angers in France, and, when France in her turn was overrun, it transferred its seat to London. In addition to the government, a portion of the merchant fleet succeeded in escaping to this country and thereafter acted on behalf of the allies, either under charter or on arranged voyages. At that time at least it owed and gave allegiance to the government exiled in London, and any reference to " the fleet " includes those who in fact controlled it and its officers and crews. Moreover, during this period the number of ships of which it was composed was increased and some millions of money were accumulated.

On March 29, 1939, when it became apparent that Germany might attack Poland, the Polish Government passed a statute giving certain powers to the Ministry in the event of the outbreak of war. The wording of this statute was of vital importance to the decision of the case. Its general effect was to transfer in such circumstances the supreme management of shipping companies to the Minister of Industry and Commerce. On February 26, 1940, a further Act was passed making it possible to appoint persons called curators to take in charge the property of Polish corporations and of Polish citizens outside the territory of metropolitan Poland.

The appellants were a Polish company, the shares of which were owned, as to 98½ per cent. by the Polish Government, and as to 1½ per cent. by a Danish concern, and a Mr. Plinius, a Danish subject, had been for a considerable time one of its two deputy managing directors. As both the managing director and the other deputy had been killed in the war, he was the sole manager at all relevant times, and on September 2, 1942, he was appointed to the further post of curator. It was common ground that in his dual capacity he was subject to the general control of the Minister of Industry, Commerce and Shipping, who, at the material dates, was a Mr. Kwapinski.

Before the middle of 1945, and after the conference at Yalta, it became apparent that recognition of the Polish Government in London (hereafter referred to as " the old government ") was likely to be withdrawn soon and the recognition accorded to a body previously known as the Lublin Government (hereafter called " the new government "). The exact date of the change was unknown, but the old government was aware that many of the officers and crews of the ships would refuse to serve under the new government partly from a genuine fear of their safety and partly because their sympathies did not lie with it. It was immaterial to consider whether their fears were justified or not provided they were genuinely entertained.

In view of the change of recognition the old government decided to terminate the employment of all civil servants and that of the shore staff of the shipping companies. At the same time they also decided to pay a gratuity of three months' salary to these persons, but a difference of view developed as to the treatment to be accorded to the officers and crews. At this time there existed an officers' trade union, the secretary of which was a Mr. Dabkowski, and also a seamen's union in which a Mr. Fligiel held that post. Having seen the British Minister of War Transport and explained to him the anticipated difficulties of retaining the officers and crews after the change, Mr. Kwapinski called a meeting at which the two union leaders were present.

Previously, Mr. Kwapinski had himself come to the conclusion that civil servants and the shore staff of the shipping companies should be dismissed and compensated by a bonus of three months' wages and that all officers and seamen who were unwilling to serve under the new government should be entitled to leave their ships if they wished and, if they did so, should be entitled to the like bonus. In the case of the officers and crews, however, he was of opinion that compensation should be paid out of the moneys of the shipping companies. In order to have the backing of his government for this measure he attended a cabinet meeting on June 25, 1945, at which his proposed action was discussed and approved. Thereupon he had an interview with Mr. Plinius on June 26 and instructed him to carry out the government's resolution. In reply Mr. Plinius pointed out that, in his view, to pay three months' compensation to the officers and men for leaving their ships would result in immobilizing their ships and would be detrimental to the interests of the company, but, he added, he would have to discuss the matter with his colleagues and would give a definite answer the next day. In a sense, Mr. Plinius, in making these remarks, was not confining his observations to the appellant company. He proposed to discuss the matter with the representatives of two other shipping companies which, like his own, were affected by Mr. Kwapinski's resolution.

As a result of this conversation a meeting of the board of management of the appellant company was held on the next day at which Mr. Plinius, a Mr. Geppert, a Mr. Paczynski (deputy managers of the appellants and also managers of the other interested Polish shipping companies) and a Mr. Winiarski, manager of the Polish Shipowners' Association, were present. At this meeting the decision to pay the bonus to the office staff but not to the ships' personnel was approved. On the same day Mr. Plinius, accompanied by Mr. Paczynski, called upon Mr. Kwapinski to tell him what they had resolved, and Mr. Kwapinski said at that or some other time: "Well, I see your difficulties "and I may be able to see another way out."

A few days later, on July 2, Mr. Dabkowski, having heard of the proposed transfer of government, wrote three letters, one to the British Minister of War Transport, one to the Polish Shipowners' Association, and one to Mr. Kwapinski, the two latter urging, amongst other things, the payment to officers and crews of the suggested bonus. Its result was to bring about a meeting on July 3. At that meeting there were present Mr. Kwapinski and representatives of the two unions concerned. Mr. Dabkowski took a note of what occurred, and this note was accepted as

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accurate by the judge. The relevant portions were as follows: "3. The compensation due to officers and men of P.M.N. In "view of payment of compensation to the administrative staff of "shipping companies, ships' crews should be paid compensation "on equal footing. The representatives of both unions request "that the Minister as the Supreme Manager of Shipping Com"panies should make a binding declaration in this matter. . . . "As to 3 (above) the Minister was and continued to be of the "opinion that, regarding the payment of compensation, officers "and men who have given splendid service and have sacrificed "a great deal cannot be treated less advantageously than the "administrative personnel of shipping companies or civil servants. "As the payment of compensation will burden shipping com"panies with considerable expense, and as they desire to have in "this matter the view of the whole cabinet, the Minister obtained "an appropriate resolution on June 25, 1945, which was published "in the Journal of Laws on the day of this meeting. Further, "the Minister declared that in exercise of supreme management "of P.M.N. he gives to officers and men who will stop working "aboard ships in consequence of the political changes the right "to compensation on equal footing with administrative employees "of the P.M.N. and civil servants. This was accepted by the "representatives of the unions, who expressed their gratitude to "the Minister for care taken in looking after ships' crews. They "requested that a cable be sent to the ships informing ships' "crews about this agreement. The Minister called his secretary "and dictated a cable to the captains of the ships of P.M.N. and "instructed the unions to deliver copies of the cables to captains "of ships of P.M.N. The Minister said that the cable will be sent "forthwith and that he will give orders to curators of shipping "companies in accordance with its contents."

Following on that meeting Mr. Kwapinski requested Mr. Plinius to come to see him, and on his arrival said: "You will have to "reverse the decision of the management board which you took "the other day." Mr. Plinius refused to do so and maintained that the resolution of the Ministers was not binding on him as curator and that it was incumbent on him in that capacity to act as a good business man. He then went to the office of a Mr. Mozdzenski, who was the Director of the Department of Commerce, asserted that he was not going to pay and that, if the Minister wanted to go through with the matter, he would have to appoint another curator.

On the next day Mr. Plinius was summoned to the Ministry by Mr. Mozdzenski and shown a telegram which, after referring to the meeting of the Council of Ministers on June 29, to the expected political changes, and to the claims of the trade organizations of officers and seamen, ended: "I also declared" (presumably at that meeting) "that in the event of their leaving "the ships owing to the above-mentioned causes the captains, "officers and seamen should be entitled to receive suitable compensation. Captains of the ships are requested to bring the "above to the notice of the crews." It was agreed that "suitable "compensation" in that passage meant three months' pay.

Mr. Plinius apparently regarded the sending of the telegram and its promises as binding only on the Polish Government and refused to send it, until it was pointed out that he was merely a mouth-piece, that he alone had information enabling it to reach those for whom it was intended and that it would be signed and paid for by Mr. Kwapinski. Thereupon the telegram, together with a letter from the Ministry to the Board of Directors of the appellants asking them to forward the cable as quickly as possible to the masters of all ships of the Polish Merchant Navy was handed to Mr. Plinius. This circular telegram was dispatched on July 4 and was followed up by a letter sent on July 5 by Mr. Kwapinski to Mr. Plinius formally directing him to pay the gratuity to masters, officers and crews of the ships of the defendant company. This letter, however, did not reach Mr. Plinius's office until July 7 and, as he was absent, did not reach him personally until July 10.

The first respondent, Mr. Boguslawski, was employed by the respondent company as second engineer of the m.s. *Morska Wola* from August, 1943, until July 11, 1945. On July 5 he was on board his ship at Salford near Manchester when the telegram was read out by the chief officer, the captain being away, and Mr. Boguslawski was told that if he felt compelled to leave the ship he would be entitled to compensation, which was that day explained to him by the chief officer and next day by the captain as meaning three months' wages. As a result of this communication he left the ship on July 11 and thereafter claimed his three months' gratuity.

The other respondent, Mr. Krupka, was a seaman carpenter. He was not on the ship on July 3 but joined it on July 4. Apparently from time to time seamen were accustomed to leave their ship and, whilst they were not actively employed, formed part of a pool of seamen who were employed and paid by the

State until they again joined a ship, when they became the servants of the shipping company. He heard the telegram read out on July 6 and, like his fellow-respondent, was told that he was entitled to three months' pay. As a result of this communication he left the ship on July 7 and made a similar claim.

Their contentions were (1) that Mr. Kwapinski, under the provisions of the law of 1939, became supreme controller of the appellant company, and that as such he authorized and decreed the payment of the bonus, and (2) that he made an offer to the masters and crews of the ships through their unions; that that offer was accepted by the representatives of the unions and the acceptance was later ratified by the respondents and acted upon by their walking off their ship.

The certificate of the Foreign Secretary relating to the recognition of the new Polish Government, issued by the Foreign Office at the request of the parties to this action, was as follows: "1. Up "to and including midnight of July 5–6, 1945, His Majesty's "Government in the United Kingdom recognized the Polish "Government having its headquarters in London as being the "Government of Poland, and as from midnight of July 5–6, "1945, His Majesty's Government in the United Kingdom recognized the Polish Provisional Government of National Unity as "the Government of Poland, and as from that date ceased to "recognize the former Polish Government having its headquarters "in London as being the Government of Poland. 2. On June 29, "1945, the following message to the Prime Minister from the "head of the said Polish Provisional Government of National "Unity was handed by the Polish Ambassador in Moscow to His "Majesty's Ambassador in Moscow: 'I have the honour to notify "'you that as a result of the understanding reached in Moscow "'between representatives of Warsaw Provisional Government "'and Polish Democratic leaders invited from Poland and from "'abroad under the auspices of the Commission of Three set up "'at the Crimea Conference, the Provisional Polish Government "'of National Unity was formed this June 28 according to "'article 45 of the constitution of Polish Republic, 1921. The "'Provisional Government of National Unity has realized in "'their entirety decisions of the Crimea Conference on the Polish "'question. At the same time I have the honour, in the name "'of the Provisional Government of National Unity, to approach "'His Majesty's Government in the United Kingdom of Great

" ' Britain and Northern Ireland with a request for the establish-" ' ment of diplomatic relations between our nations and for " ' exchange of representatives with the rank of ambassadors.' " 3. I am advised that the question of the retroactive effect of " recognition of a government is a question of law for decision by " the courts."

Finnemore J. gave judgment for the respondents (plaintiffs). The Court of Appeal affirmed his decision. The appellants (defendants) appealed to the House of Lords.

Pritt Q.C., *J. Scott Henderson Q.C.* and *Robin Dunn* for the appellants. The operation of recognizing a government always occurs at a different date from the fact which it recognizes and so must have a retrospective effect, just as the sovereign's reign begins at the accession and not at the coronation.

Here the British Government dropped the recognition of one Polish Government and took up the recognition of another Polish Government which had come into existence a week before. The recognition of the new government must be retrospective to June 28, 1945, when it came into power as the established government of Poland even though it was not then in a position to exercise sovereign powers over all its subjects. There cannot exist simultaneously two governments of the same country at one and the same time, and from June 28 the new government was the only lawful authority of Poland. So both the recognition of the new government and the withdrawal of recognition of the old government must be retrospective. Consequently the acts of the Ministers of the old government during the indeterminate period between the two dates must be held to be invalid, including those of the Minister of Industry, Commerce and Shipping, so that he had no power to enter into the obligations into which he purported to enter.

The authorities bearing on the effect of recognition of a foreign government are Oppenheimer's International Law, 7th ed., vol. I, p. 125 (section 73); p. 132 (section 75); p. 144 (section 75 f); p. 148 (section 77); Lauterpacht's Recognition in International Law (1947), pp. 59–60; *Lazard Brothers & Co.* v. *Midland Bank Ld.*[1]; *Aksionairnoye Obschestvo A. M. Luther* v. *James Sagor & Co.*[2]; *Haile Selassie* v. *Cable & Wireless Ld. (No. 2)*[3]; *Bank of Ethiopia* v. *National Bank of Egypt*[4]; *Banco de Bilbao* v.

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[1] [1933] A.C. 289, 297.

[2] [1921] 3 K.B. 532, 541, 549, 554–6.

[3] [1939] Ch. 182, 197.

[4] [1937] Ch. 513.

Sancha[5]; *Government of the Republic of Spain* v. *S.S. Arantzazu Mendi*[6]; *Guaranty Trust Co.* v. *United States*[7]; *White, Child & Beney Ld.* v. *Simmons.*[8]

On these authorities the retrospective operation of the recognition of a government is normal, and in order to escape from that result the respondents would have to find some abnormal factor in the case; but there is here nothing to alter the normal rule, and so it should apply.

As to the terms of the certificate, it does not specify the moment at which the British Government recognized that the old government had ceased to have authority and the new government had begun to have authority. It was natural that the British Government should simply say: "We now tell the "world that we now recognize the new government and cease to "recognize the old government." At that particular moment the British Government realized that the new government had come into power and so recognized it as then having control. Everything must be done at some point of time and so the British Government gave this recognition at midnight on July 5–6, 1945. There are two senses in which the word recognition is used and the difference between them is one of time and not of quality. In one case the recognition operates uno ictu; in the other, dealing with a relationship, it brings to an end a previously continuous and continuing recognition of a former status. Here there came a moment when it was necessary or useful for the Foreign Office to give a narrative of what it had done in this connexion and in so doing it turned its previous operations into the past tense; it was only narrating what it had done and not altering it. Up to that midnight the British Government was in a continuous state of recognition of the old government. At midnight it recognized the new government and thereafter was in a continuous state of recognition of the new government. There is a presumption that the Foreign Office did not refuse to recognize acts of the new government during the time when it was de facto in control of Poland after June 28, 1945, for once the whole of Poland was de facto controlled by the new government all Poles thereafter owed that government allegiance and their property became subject to its control. The attitude of the Foreign Office is made clear by paragraphs 2 and 3 of the certificate, which must have been intended to serve some purpose and can only have been intended to qualify the meaning which would otherwise have been attached to paragraph 1. It makes nonsense of the certificate if the recognition operates from midnight for all purposes and it has no retrospective effect. Paragraph 3 was put in in case anyone might think that what was said in paragraph 1 meant that the recognition had no retrospective effect; therefore it was specified that it was a matter for the court. The certificate should not be construed as a recognition that the new government was de facto in control of anything in particular. Here one is not dealing with the case of a de facto and a de jure government rivalling each other. Nor is this a case of divided territory or divided control. One is dealing with one integral State and when one government goes another comes in. Since one is dealing with one integral State, the proper construction of the certificate is that at one moment there was a government of everything that was Poland and at another moment its place was taken by another government of everything that was Poland. The meaning of the certificate is that the new government became de jure the government of Poland on June 28, 1945. It means that the Foreign Office wrongly recognized the old government till midnight, July 5–6, 1945, in the sense that it then changed its mind. An example of a similar effect is that a decree of nullity of marriage means that the spouses were never married.

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[5] [1938] 2 K.B. 176.
[6] [1939] A.C. 256.
[7] (1938) 304 U.S. 126.
[8] (1922) 127 L.T. 571.

As to *Guaranty Trust Co.* v. *United States*,[9] the exception to the principle of retroactivity there recognized was based on convenience and not on principle and, even if it were applied by the English courts, it would not avail the respondents in this case. The passage[10] referring to "previous transactions consummated "here between its predecessor and our own nationals" shows that unless a transaction has reached the stage of being consummated, and unless it was between the old government and a British subject, it does not come within the principle of that case. Here there was not a vested right and the transaction was with Polish subjects.

Any offer made by the old government lapsed when the new government came in, though it could have made a fresh offer. It cannot be suggested that the offer was valid until it was repudiated; the doctrine is both novel and unsound.

[They also submitted divers arguments based on the true effect of Polish law.]

J. Scott Henderson Q.C. following. This is the first time that the House of Lords has had to consider the principles on which the retrospective effect of recognition is based.

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[9] 304 U.S. 126.

[10] Ibid. 140.

The only material facts are that the new government at the time of the recognition was the government of Poland in Poland, the effective government of the territory of Poland, while the old government was an émigré government with no control over Polish territory. The offer made could not be accepted by the officers and seamen till after July 5, and by then the government whose act had led to the making of it had ceased to be a government even in name. The contract, obligation or transaction was between Polish nationals and made or created under Polish law. The act of the government which gave rise to it, not being an act of the then government of Poland, would not be recognized as a government act by any Polish court of justice.

The governing principles are these: (1) The question whether a new government in a foreign country has gained control of it is a matter on which our courts are bound by the recognition of that fact by Her Majesty's Government. (2) The extent of a foreign government's territorial jurisdiction and the time at which it is achieved are both matters on which our courts seek information from Her Majesty's Government. (3) Since recognition of a new government must follow and not precede its establishment, the doctrine of retroactivity applies, because the comity of nations requires that only one government can be recognized as being in control of a particular territory at any one time. (4) The national law governing a foreign company is the law enforced at the seat of its domicile and transactions relating to its property abroad are governed by that law. (The domicile of this company is Gdynia and its affairs must be regulated by the law for the time being in force there.) (5) Different considerations arise in relation to transactions which are consummated and those which are not and transactions in which nationals of countries other than Poland are or are not involved: see Oppenheimer's International Law, 7th ed., p. 144 (section 75 f); p. 384 (section 357 a); *Aksionairnoye Obschestvo A. M. Luther* v. *James Sagor & Co.*[11]; *White, Child & Beney Ld.* v. *Simmons*,[12] and *Guaranty Trust Co.* v. *United States.*[13]

It is just as much a denial of the sovereignty of a government to recognize an act of its rival as to refuse to recognize one of its own acts. The whole matter turns on what is convenient in the comity of nations. It is immaterial that the transactions in question took place in England and that the company can be sued in England. There is nothing relevant to this matter in the history of the old government from its ousting from Poland. It is irrelevant that Great Britain gave it hospitality and allowed it to exercise governmental jurisdiction here.

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[11] [1921] 3 K.B. 532.

[12] 127 L.T. 571.

[13] 304 U.S. 126.

As to the construction of the relevant Polish law, see *Russian Commercial and Industrial Bank* v. *Comptoir d'Escompte de Mulhouse.*[14]

Elwes Q.C. and *Niall MacDermot* for the respondents. The certificate of the Foreign Office plainly states that till midnight of July 5–6, 1945, the old government was in a condition of being recognized by the British Government, that that recognition ceased at midnight and that the new government was recognized as from midnight. Before midnight the old government was in power and thereafter the new government. The withdrawal of recognition from the old government was co-ordinated by all the great Powers. It amounted to the abolition of the old government and so was different from other cases of withdrawal of recognition. It should be remembered that, apart from its administrative functions, it had a judiciary of its own.

If during the period immediately preceding July 5, 1945, the old government had legislated for Poland, the courts of England would have asked the Foreign Office for information whether and how far it was the de facto government in different territories. When, as in the present case, the Foreign Office has given information, the courts will decide whether that information is conclusive and, if it is not, they can receive evidence in order to reach a conclusion.

The authorities on the retroactive effect of the recognition of a government are *Aksionairnoye Obschestvo A. M. Luther* v. *James Sagor & Co.*[15]; *Lazard Brothers & Co.* v. *Midland Bank Ld.*[16]; *White, Child & Beney Ld.* v. *Simmons*,[17] *per* Atkin L.J.; *Haile Selassie* v. *Cable & Wireless Ld.*[18]; *Bank of Ethiopia* v. *National Bank of Egypt*[19]; *Banco de Bilbao* v. *Sancha*,[20] and *Government of the Republic of Spain* v. *S.S. Arantzazu Mendi.*[21] What Lord Greene M.R. said in *Haile Selassie* v. *Cable & Wireless Ld.* (*No.* 2)[18] is obiter and wrong.

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[14] [1925] A.C. 112, 144.
[15] [1921] 3 K.B. 532, 536.
[16] [1933] A.C. 289, 297, 302.
[17] 127 L.T. 571, 578, 584.
[18] [1939] Ch. 182, 189–90, 197.
[19] [1937] Ch. 513, 518, 522.
[20] [1938] 2 K.B. 176, 195–6.
[21] [1939] A.C. 256.

In certain respects recognition of a new foreign government is retroactive, but in the present case the form of the recognition excludes that effect. The principle of retroactivity is far narrower than is contended for by the appellants. The authorities do not establish the novel proposition that where there is no evidence other than the certificate of recognition the principle of retroactivity automatically relates back the recognition to an earlier date in defiance of contemporaneous facts. *Guaranty Trust Co.* v. *United States*,[22] properly understood, is an example of the application of the principle contended for by the respondents.

[They also submitted divers arguments as to the effect of Polish law.]

Niall MacDermot following. As to the question of retroactivity three submissions are made: (1) If there is any room for the operation of the doctrine of retroactivity under this certificate, at most it can only operate (a) to validate acts of the new government during the "twilight" period between June 28 and July 6 in its proper sphere, viz., in respect of matters within areas where it had de facto control, and (b) to invalidate acts of the old government outside its proper sphere, viz., in respect of matters in areas over which it had no proper control. (2) When a foreign government obtains the recognition of Her Majesty's Government it obtains it as the successor of a previously recognized government and, so far as our courts are concerned, it must be regarded as having succeeded to all the assets and liabilities which the old government had bona fide accumulated or incurred in its proper sphere up to the date of the "derecognition" of the old government, the date of the change. (3) The succession itself does not date back, since this would render the recognition by Her Majesty's Government an idle ceremony. The requirements of convenience and the comity of nations are met by our courts being allowed to inquire into the validity of transactions during the "twilight" period and only enforcing those carried out by a government, whether old or new, within its proper sphere. The succession takes place at the moment of recognition, at the end of the "twilight" period, and the principle of retroactivity does not date it back. What Lord Greene M.R. said in *Haile Selassie* v. *Cable & Wireless Ld.* (*No.* 2)[23] is obiter and wrong.

As to the proper sphere of the old government, after June 28 it was still exercising sovereign powers, just as it had before, over Polish nationals and property here. It had not become a mere shadow. Its proper sphere or scope continued to be the government of Polish nationals within those countries which continued to recognize it as the government of Poland. (A parallel case is that of the government of Chiang Kai-shek vis-à-vis the United States now, his government not being on Chinese soil, since Formosa is legally part of Japan.) *Guaranty Trust Co.* v. *United States*[24] shows that subsequent "derecognition" of the old government does not invalidate acts done within its proper sphere. The Minister of Industry, Commerce and Shipping acted bona fide. But if, for example, on July 3, in order to spite the new government, he had entered into a contract to sell all the ships of the company for a nominal sum to a purchaser who undertook that they would never be used to help the new government, our courts would not have enforced that contract, because it would not have been a bona fide exercise of his powers. The respondents' contentions are supported by *Bank of Ethiopia* v. *National Bank of Egypt*[25] and *Banco de Bilbao* v. *Sancha*.[26] As to the succession of one government to another, see *United States of America* v. *McRae*.[27]

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[22] 304 U.S. 126.

[23] [1939] Ch. 182, 197.

As to the question of the domicile of the company in Gdynia, the Minister did not derive his powers from the statutes of the company but from article 19 of the Polish Law of March 30, 1939. Under it he had power to act for the company in respect of its employees and property here, though, probably, during the "twilight" period, not in Poland. In English law a company registered in one country but setting up a branch in another, where it carries on business, acquires a dual domicile: see *Carron Iron Co.* v. *Maclaren*.[28] Polish law is presumed to be the same as English law until the contrary is proved.

Pritt Q.C. in reply. *Bank of Ethiopia* v. *National Bank of Egypt*[29] does not help the respondents. The whole of the argument on areas of control, de facto control and spheres of jurisdiction has nothing to do with this case. We are not dealing with different areas, as when the Italians invaded Abyssinia or one set of people in Spain were fighting another set of people. Here there is no contest save as to which was the lawful government at the relevant time. There is only one Polish State and that can have only one government at a particular moment. The succession is complete and final. The argument of the respondents is based on one government having de facto control in one place and another government having de facto control in another place. But the Foreign Office certificate does not recognize anyone as having de facto control of Polish soil or property, nor could it, for His Majesty's Government could not recognize two governments of one integral State; it could only do so where there was a division of territory.

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[24] 304 U.S. 126.

[25] [1937] Ch. 513.

[26] [1938] 2 K.B. 176.

[27] (1869) L.R. 8 Eq. 69, 75.

[28] (1855) 5 H.L.C. 416.

[29] [1937] Ch. 513.

Retroactivity is the normal rule, dating the recognition back to the establishment of the newly recognized government. As to the problems of the "twilight" period, see *Haile Selassie* v. *Cable & Wireless Ld.* (*No.* 2).[30] What Lord Greene M.R. said there is right. In the present case, looking at the matter from the point of view of London just before July 6, 1945, it would be known that what the old government could do then would be invalidated in a few days. That would be the effect of retroactivity; one cannot have retroactivity without acting "retro." *Banco de Bilbao* v. *Sancha*[31] and *Bank of Ethiopia* v. *National Bank of Egypt*[32] are two instances in which the courts in recognizing the validity of the acts of a new government have invalidated acts of the old government. Dealings between the old government and nationals of other countries must be validated to whatever extent is proper and convenient on the principles of *Guaranty Trust Co.* v. *United States*[33]; they must be completed transactions. The present transactions were not for the benefit of Poland, since they tended to withdraw men from her ships, and therefore should not be recognized. See also *Government of the Republic of Spain* v. *S.S. Arantzazu Mendi*[34]; *Aksionairnoye Obschestvo A. M. Luther* v. *James Sagor & Co.*[35]; *Republic of Peru* v. *Dreyfus Brothers & Co.*,[36] and Lauterpacht's Recognition in International Law (1947), p. 58.

Banco de Bilbao v. *Sancha*[37] shows that a limited company domiciled in Gdynia is governed by the law prevailing there. The company cannot have its own proper law determined by two different domiciles at the same time.

Their Lordships took time for consideration.

July 11. LORD PORTER stated the facts and continued:—My Lords, some dispute arose as to whether Mr. Kwapinski acted as he did in the capacity of Minister of Industry, Commerce and Shipping, or as the head of the respondent company.

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[30] [1939] Ch. 197.
[31] [1938] 2 K.B. 176.
[32] [1937] Ch. 513.
[33] 304 U.S. 126.
[34] [1939] A.C. 256, 263.
[35] [1921] 3 K.B. 532, 543.
[36] (1888) 38 Ch.D. 348, 361.
[37] [1938] 2 K.B. 176.

It is common ground that the matter is governed by Polish law, and what that law is will have to be decided later. But the facts must first be determined. The chief matter in dispute is as to the events which took place at the meeting of July 3. Upon that topic the learned judge had the advantage of hearing the evidence of Messrs. Dabkowski, Kwapinski and Fligiel and seeing the witnesses. Moreover, the notes which Mr. Dabkowski made after the meeting, and from which I have already quoted, were available and were used to refresh his memory. The notes themselves were before the court and, although they were not strictly admissible, their use in combination with the evidence of the witnesses who were present at the meeting is not a matter of serious objection.

At that meeting the ships' personnel submitted certain matters for consideration, including the resolution contained in paragraph 3 of Mr. Dabkowski's notes, which has been set out above. In answer Mr. Kwapinski stated that, though he was aware of the difficulties, he hoped that the ships' crews who had carried on during the war with much fortitude and self-sacrifice would now be equally reasonable. The rest of what occurred at the interview, so far as it is relevant, is dealt with in the other passage already quoted from those notes.

I have only referred to Mr. Kwapinski's remark that he hoped the men would be reasonable as contradicting a suggestion which was thrown out, that the old government's object was to injure and embarrass the new, a suggestion which Mr. Plinius himself rejected when he said he did not think that the crews required any incentive to make them leave their ships. He acknowledged that many would do so, bonus or no bonus. The importance of Mr. Dabkowski's evidence, however, if it is accepted, as it was by the learned judge, and, in my view, should be by your Lordships' House, in the absence of any valid ground for its rejection, is to show the capacity in which Mr. Kwapinski acted and to show that an offer was made to the union representatives and accepted by them and that steps were taken to ensure that each individual member of a ship's crew should have the offer brought to his notice.

On these facts the learned judge's finding is best expressed in his own words[38]: "So far I am satisfied on these facts, first,

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[38] [1950] 1 K.B. 157, 170.

"that Mr. Kwapinski, the Minister, entered into, and intended "to enter into, an obligation on behalf of the defendant company "to pay this gratuity; secondly, that he communicated that "intention to Mr. Dabkowski and Mr. Fligiel on behalf of their "unions; thirdly, that they there and then accepted that offer or "obligation; fourthly, that Mr. Kwapinski, the minister, did it "purporting to act on behalf of the company under the Act of "March 30, 1939. Further, I am satisfied, on the facts, as "indeed is quite plain, that he intended and arranged that notice "of this offer or obligation or agreement should be sent to all "crews, so that the men should know about it and be able to "act upon it, and that, although it is true that the ministry "paid for it, the defendant company, through Mr. Plinius, sent "the information to all these ships." Its legal effect must be considered hereafter.

Having regard to the fact that Finnemore J. saw and heard the witnesses, I do not think it possible for your Lordships to differ from the conclusions of fact at which he arrived. It is true that in his letter of July 5 already referred to, the Minister mentions the Act of 1940 under which curators were appointed and not that of 1939 making him supreme controller, but having regard to Mr. Dabkowski's evidence and the fact that the letter itself contains a direction to Mr. Plinius to pay, I cannot regard this omission as indicating that Mr. Kwapinski was not acting in his capacity of supreme manager.

If, then, there had been no change of government, subject to one or two minor considerations, the respondents must have succeeded. But undoubtedly that change has a serious bearing on the position of the parties.

In the first place it is said that though recognition of the new government only took place on July 5–6, yet that recognition harks back to the moment at which the new government is shown to have come into power as the established government of the country, and that moment is June 28. There cannot, it is submitted, be two governments of the same country at the same time, and from June 28 onwards the only lawful authority was that of the new government. It follows, it is contended, that Mr. Kwapinski was no longer minister or supreme controller of the appellant company or entitled to give any orders or make any contracts in their name after June 28.

Admittedly proof of recognition must depend upon the production of a certificate from the Foreign Secretary of this country pronouncing the fact of recognition and the time at which it is granted. Its effect, may, however, depend, at any rate to some extent, on its terms and therefore it is desirable that it should be set out in full. It reads as follows: [His Lordship read the document and continued:] Two views of the effect of this certificate have been propounded to your Lordships. For the respondents it is argued that the certificate in plain terms specifies the moment at which the change of government took place. Up to the end of July 5 on this view the old government was in power, thereafter the new. There is no scope for any argument as to the retroactive effect of an acknowledgment of change of government.

On the other hand, the appellants say that the certificate does not delineate the moment at which the British Government recognized that one government had ceased to have authority and another had begun. It means only that at a particular moment the British Government realized that the new government had come into power and recognized it as then having control, but said nothing as to when that control began except what is to be found in the statement contained in clause 2.

There is, it is true, no certificate of the British Government to the effect that the new government was in de facto control of metropolitan Poland by June 28, but that circumstance seems to have been recognized: if it were not, there appears to be no reason for the insertion of clause 2 or for the observation contained in clause 3.

Though I am myself prepared to accept the view that the new government was the de facto government of metropolitan Poland from and after June 28, the question has yet to be answered whether it was at that time in control of Polish citizens elsewhere or of their ships wherever they might be. For the purposes of the present case, however, so wide a problem need not be considered. It is enough to ask whether between June 28 and July 6 the new government were in de facto control of the members of the old government then resident in London and then recognized as the de jure government of all Poland and of the ships and crews present in this country and elsewhere. Obviously it was not exercising such control, but the argument presented on behalf of the appellants maintains, as I understand it, that there can be here no question of divided control. The only Polish territory is that of metropolitan Poland and individual property or ships whether in that country or elsewhere are, therefore, subject to, and subject only to, the acknowledged government of that country. There cannot be two governments of a single State.

The proposition may in ordinary circumstances be true, but where a state of war exists it is not entirely accurate. After the old government reached this country, there were in fact two authorities to be taken account of even in metropolitan Poland: (1) the occupying German forces, and (2) the old government which was recognized by this country as the de jure government of all Poland and of all Polish citizens and their property and as the de jure and de facto authority over all Polish citizens, their property and ships outside Poland itself. It was, no doubt, an anomalous position, but the anomaly was due to the unprecedented position under which recognition was granted to an exiled government centred in this country. Therefore, although I am prepared to accept that the recognition of the new government dates back to June 28 in Poland where that government had effective control, I am of opinion that that control did not extend to the old government or the Polish merchant fleet and its personnel until July 6, 1945, from which date the old government accepted the change, as indeed they had to. A further suggestion was put forward, I think, for the first time, in your Lordships' House, that as the official seat of the Polish fleet is at Gdynia, the acting Polish Government had from its inception control over the fleet and its members. The argument lacks substance. At best it means no more than that between June 28 and July 6 the new government might have taken some steps which they could enforce in Gdynia. What they could have done was not suggested to your Lordships, but perhaps the simplest answer to this argument is that in fact they did nothing.

The appellants, however, put forward the contention that once the whole soil of Poland is shown to have been de facto controlled from June 28 by the new government, all its nationals owe allegiance to it from that date, and their property is taken out of the control under which it formerly was held and became subject to the new government. It was not like a case where the territory is divided and one government controls one part and another another.

Upon this question some light is thrown by the American case of the *Guaranty Trust Co.* v. *United States*,[39] in which the result of the recognition of the Soviet Republic, 16 years after it became de facto government of Russia, was discussed. The question

[39] 304 U.S. 126.

there was whether notice of the repudiation of an obligation which had been transmitted to those representing the Kerenski Government during the time at which it was recognized by the American Government was effective to bring into play a statute of limitations and so defeat the claim when ultimately presented by the Soviet Government after it was recognized. It was admitted there, as it was here, that in the ordinary case recognition of a new government is retroactive to the time at which it is shown or acknowledged to have been in control, and for this the English decision in *Aksionairnoye Obschestvo A.M. Luther* v. *James Sagor & Co.*[40] was relied on, a decision which may now be reinforced by a reference to *Lazard Brothers & Co.* v. *Midland Bank Ld.*[41] and other cases. But that admission does not affect transactions carried through under the old regime. As was said in the case in question[42]: "The argument . . . ignores the "distinction between the effect of our recognition of a foreign "government with respect to its acts within its own territory "prior to recognition, and the effect upon previous transactions "consummated here between its predecessor and our own "nationals. The one operates only to validate to a limited "extent acts of a de facto government which, by virtue of the "recognition, has become a government de jure. But it does "not follow that recognition renders of no effect transactions "here with a prior recognized government in conformity to the "declared policy of our own government." It was suggested that that decision was limited to cases where the transaction took place with nationals of the recognizing country. I can see no reason in principle for doing so, and it must be remembered that for many years the Kerenski Government had been but a shadow, whereas, in the case now under consideration, the old government had been active and both capable of controlling and in effective control of the Polish merchant fleet.

Mr. Kwapinski was, in my view, still Minister of Industry, Commerce and Shipping. What, then, were his powers in respect of the respondent company? They were derived from the Act passed on April 21, 1939, entitled "Act of March 30, 1939, "concerning the communications in the defence service of the "State." For the purpose of this case it is, I think, only necessary to quote portions of three of its articles, viz., 2, 13 and 19. They provide as follows: "*Article* 2—(1) The provisions

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[40] [1921] 3 K.B. 532.

[41] [1933] A.C. 289.

[42] 304 U.S. 126, 140.

" of the present decree are applied to the following means of " communication:— . . . 3. Sea transport . . . . *Article* 13— " (1) In the event of the outbreak of war, or of an order of " mobilisation and also in circumstances when a resolution of " the Council of Ministers will determine that the interest of the " defence of the State so requires, all communications shall be " subordinated to the interest of the defence of the State. . . . " *Article* 19—In the circumstances set out in Article 13 (1), " local government and private shipping undertakings shall be " placed under the supreme management of the Minister of " Industry and Commerce, and their boards of management shall " become executive organs of the Minister of Industry and " Commerce."

On the face of it I should have thought these provisions meant that the minister could do what he liked. No doubt, like every other official, he must act honestly, but no suggestion is made of dishonesty, and short of such action the minister is empowered to use his discretion without limitation. It is, however, contended that his powers are by no means so wide.

In the first place, it is maintained that the authority of the minister is subordinated to the provisions of the Code of Obligations of the Polish State of October 27, 1933. Certain laws, it is said, were declared to cease to be in force by article 40 of the Act of 1939, but the Code of Obligations was not amongst them. Accordingly, article 474, para. 2, of that Code was still applicable, and under it: " A member of the authorities of a company " and the liquidator should in exercising their duties deal with " the diligence of a conscientious business man and are respon- " sible to the company for damages caused by the lack of such " diligence."

As I have said, in addition to being the only surviving manager of the appellants, Mr. Plinius was appointed curator on September 2, 1942. The appointment was made under a regulation, No. 27 of May 1, 1940, the object of which was, it appears, to give to the person appointed the function of administering and disposing of Polish property abroad. His powers are set out in paragraph 2 (1): " The powers of a curator may " include: (*a*) Dealing with all matters regarding property " belonging to a particular person or corporation abroad, with " full representation of the owner in all legal transactions con- " cerning the administration and disposal of his property. In " cases, however, of disposal by sale or otherwise, of immovables, " or of an enterprise or of the whole or major part of movable "property, previous consent of the Minister of Finance is "necessary. (*b*) Acting as laid down in (*a*) above, subject to "certain exceptions and limitations, such as the exclusion of "right of sale of property or the duty to invest the funds in a "specified manner or the duty to obtain the consent of the "Minister of Finance or of other Departments of the Government of the Polish Republic for specified acts, etc. (*c*) Carrying out activities limited in time or extent, concerning the "administration and disposal of property abroad belonging to a "particular person or corporation, such as acting with the powers "of an authority of a corporation provided for by its statutes, "or acting as guardian of an infant or curator of a person under "some legal incapacity or administering another's property "within the territory of any one foreign State, etc. . . ." And paragraph 3 (1) sets out an obligation similar to that imposed upon a manager by the Code of Obligations and reads as follows: "The curator is under the obligations to transact all business "entrusted to him with diligence of a good business man and is "responsible to the person with whose affairs he is dealing to "the same extent as if he were appointed by him as his attorney "for these matters."

It was on these grounds that Mr. Plinius, whether in his capacity of manager or curator, refused to carry out Mr. Kwapinski's instructions and maintained that he might be dismissed but was not obliged to and would not carry out the minister's instructions, and further asserted that the minister could not act of his own motion but only through the company's officials. The promise of the bonus, it was contended, was contrary to the action of a good business man; it would immobilize the ships and be an incentive to the crews to leave their employment.

There was ample evidence, however, that many of the employees would leave, bonus or no bonus, and it might be thought that in the long run generosity to its employees would benefit the company. But in my view it is unnecessary for the respondents to rely on such a suggestion. As I view it, there is no qualification on the minister's powers except honesty. The authority is given in plain terms in circumstances of emergency, and there is no ground for construing it as limited by the provisions contained in the regulations applicable either to the managers or curators of shipping companies.

Nor do I see any reason for supposing that the minister could not act himself but must obtain a subordinate willing to carry out his instructions. The "boards of management shall become "executive organs of the minister," says article 19, and that provision, to my mind, makes the minister supreme manager of the company, enabling him to do of his own volition anything which the company itself might do. Nor could his authority be flouted by the intransigeance of the board of management or its members, and I can see no reason for limiting it to the existence of a state of actual warfare.

Next, however, it is said that Mr. Kwapinski never did give instructions or make a promise as supreme manager of the respondent. All he did, it was contended, was to make a declaration and send a telegram declaring his intention to perform an executive act. This contention, like those depending upon the construction of the Polish decrees, is strictly a matter of Polish law, but the view that he did give instructions has the support of the learned judge who so decided after hearing the expert evidence produced on each side. The conclusions reached seem to me to be reasonable and such as I should myself arrive at upon the translated language, but in truth, unless there is some substantial objection to the judge's finding, it is, I suggest, your Lordships' duty to follow it, inasmuch as it is a question of fact upon which the impression created on the mind of the judge who heard the witnesses is of primary importance.

So, likewise, I suggest that your Lordships should be guided by the value placed on the evidence given in the court of first instance by the judge who heard it given. The meeting with the union officials on July 3, the pronouncement made to them, the capacity in which it was made, are all matters to be decided in accordance with Polish law. In much of them there is no difference of opinion. It is, I think, common ground that in interpreting the meaning and effect of language under that system one must not place too strict an interpretation on the language used—the general intention must be ascertained and the language construed accordingly.

If this course be adopted, it is urged that Mr. Kwapinski is indeed the supreme manager but in the collocation in which they are found those words only mean that he has full control in the interest of the defence of the country and is entitled to give general directions but not to enforce them himself. I should not myself so read the intended scope of the regulations. Moreover, to do so would be contrary to the evidence of Dr. Bloch which Finnemore J. has accepted, and I should have thought a right confined to giving instructions, which could only be enforced by dismissing the individual to whom they are given, was of little use in war time and an unnatural construction of the language from which the power is derived. Even so, of course, the minister might not have given the necessary orders, but only have authorized the sending of a telegram stating what he intended to do; but the whole gist of the documents, the language used and the evidence given is, in my opinion, to the contrary effect, and the language of the learned judge which I have quoted shows that he, too, took this view.

The appellants, however, take the further point that if any agreement was made by the minister it was what in Polish law is called a collective agreement and unenforceable unless in writing. That, if it is collective, it must be in writing is not disputed: see article 445 (2) of the Code of Obligations. What, then, are collective agreements? Obviously the individual agreements of individual workmen are not. A collective agreement is, says Dr. Bloch, something that binds a body or group within a body generally and must apply generally and not merely to one individual or one occasion. For instance, if the agreement provided that the body or group should have every Easter Monday as a holiday, it would be a collective agreement; if, on the other hand, it provided that the next Easter Monday should be a holiday but no other, it would not. In applying these considerations to the present case one must determine what the promise contained in the telegram meant. The exact meaning will no doubt have a bearing upon the position of Mr. Krupka vis-à-vis Mr. Boguslawski, but its exact effect in that respect can be dealt with later. At the moment all I desire to say is that in my view it was an offer to all men who were in the employment of the respondents when it was sent or who should be in that employment when the recognition of the new government took place—an offer which, until it was withdrawn, they were entitled to accept. Was it, then, a collective agreement? I think not. It was an agreement binding by Polish law but only to a limited number of persons for a particular occasion. None who joined after July 5 were included: it was not a general provision. This is the view which Dr. Bloch took of it, and I doubt whether Dr. Piotrowski, who gave evidence on behalf of the appellants, was wholly at variance.

It is next objected that even if Mr. Kwapinski intended to create a contractual relationship on July 3, the union representatives were not authorized to make a contract and in any case they were acting on behalf of their union and not on behalf of their individual members. I do not find myself able to accept either contention. Undoubtedly the representatives had power under their statutes to make binding contracts on behalf of their unions and might have done no more. But they were urgent that telegrams in a common form should be sent to all the ships and their contents disseminated amongst the crews. This course of action seems to me consistent and only consistent with an intention to act for their individual members. But I doubt whether it matters in which capacity they acted or, indeed, whether they acted at all. The result of the meeting was that the minister, in his capacity as supreme manager of the respondent company, made an offer which he caused to be broadcast to each member of the crews and which they were free to accept by word or action. Whether, therefore, the acts of the respondents in walking off the ship be regarded as a ratification of a contract made on their behalf by their union leaders or as an individual acceptance of an offer made by Mr. Kwapinski on behalf of the appellant company, the result is the same.

Having regard to the view which I have just expressed it becomes unnecessary to come to any final opinion as to the effect of what have been called unilateral obligations in Polish law. The difference between that and English law is perhaps best expressed by saying that, even in the case of an oral contract, no consideration is required. It is enough that you have a declaration of intention by one of the parties. Such a declaration will in certain circumstances produce a unilateral obligation which, if accepted by the other, becomes bilateral. Such was Dr. Bloch's testimony as to Polish law, and it was accepted by the learned judge.

The appellants, however, relied upon articles 107 and 108 of the Polish Code of Obligations of 1933, and sought to interpret the incidents which took place on July 3 in another way. Mr. Kwapinski, they said, was not making and did not intend to make an offer either to the unions or to their individual members. He was making a declaration, not an offer. In my view this contention fails. Even if it be accepted that Mr. Kwapinski's intention is all-important and may override a strict verbal interpretation of the words used, I see no ground, either in English or Polish law, for supposing that he did not intend his words to be taken in their obvious meaning.

As a further argument the appellants maintained that the bonus was a donation. The definition and effect of a contract of donation are set out in articles 354 and 355 of the Code of

Obligations, which are in the following terms:—Article 354 (1): "By the agreement of donation the donor undertakes to provide "an increment of the property of the donee out of his own "property gratuitously." Article 355: "The provisions con-"cerning donations shall not apply: . . . (3) when increment "of property which had been either promised or provided for, "satisfies either a moral duty, a propriety of behaviour or "custom." I have quoted only those portions which seem to me strictly relevant. For the purposes of the present case it may be accepted that this bonus is a donation in the terms of the definition, but properly regarded, it satisfied, I think, either a moral duty or a propriety of behaviour. The crews had, whilst the war lasted, in storm and danger, sailed their ships in the cause of the allies, and had earned a substantial sum of money for the owners. Some consideration was due to them even though they were unwilling to serve under the new government. A mere captious desire to injure the new government is not suggested or proved. The respondents are therefore, in my view, exempted from complying with the formalities otherwise required in the case of a donation.

Finally, it was said that whatever view might be taken of Mr. Boguslawski's case, Mr. Krupka must fail because he was not on board his ship or employed by the respondents when the bargain was made. In the view which I should myself have taken, that the pronouncement made by Mr. Kwapinski on July 3 comprehended all those who might be in the employment of the shipping company before the British recognition of the new government, this fact becomes immaterial. But Dr. Bloch seems to have taken a different view of the construction which Polish law would put upon it, and Mr. Linton Thorp appears to have conceded that the agreement of July 3 made with the unions comprehended only those members of ships' crews who were members on that date. But even suppose it originally only comprehended those actually in the service of the company on July 3, the telegram was sent by one who was supreme manager and the offer contained in it was never withdrawn: it was therefore a valid offer and remained valid when it was sent to Mr. Krupka on July 6 and accepted by him on July 7. In reaching this conclusion I find myself in agreement with Cohen L.J. in thinking that the offer made by Mr. Kwapinski remained in force, even if he had ceased to have authority to make it, from July 6 onwards. No doubt the new government disapproved of it but they never withdrew it, and the contention that it continued in force is supported by article 66 of the Code of Obligations which has been translated: "An offer or an acceptance of an offer "remains valid notwithstanding that the person who expressed "it died, or became incapable of legal action before the contract "was made, unless contrary transpires from the expression of "will (intention) of the parties or from the circumstances." This offer, in my opinion, remained valid unless it was withdrawn, and though I can find evidence of objection, I can find none of withdrawal.

For these reasons, which, in spite of some variations, are substantially those entertained by the learned judge and the Court of Appeal, the appeal in my opinion fails and should be dismissed with costs.

LORD OAKSEY. My Lords, I agree that this appeal should be dismissed. I think Finnemore J.'s judgment was right.

In the first place, I think it clear that Mr. Kwapinski on behalf of the appellant company and the seamen's union on behalf of their members were empowered to enter into and intended to enter into a binding obligation that the appellant company should pay three months' wages to Polish seamen who left Polish ships on the recognition of the new government by the British Government. It is unnecessary to decide whether they intended the obligation to extend to seamen in the pool.

That this was their intention has scarcely been challenged and all the witnesses on Polish law agree that it is intention that governs in Polish law. But then it is argued that Mr. Kwapinski had no power to enter into any such obligation on behalf of the appellant company in face of Mr. Plinius' opposition. In my opinion this contention is unarguable. Mr. Kwapinski, as Minister of Industry, Commerce and Shipping, was the supreme manager of the appellant company and Mr. Plinius, whether as managing director of the company or its curator, was an executive organ of the Minister of Industry, Commerce and Shipping. It is impossible, in my view, to interpret a statute passed to meet an outbreak of war and containing such a provision as article 19 of the statute of March 30, 1939, as meaning that the supreme manager cannot give effective orders to his own executive organs. Even if this were not so, Mr. Plinius, though he opposed Mr. Kwapinski's offer, did not interfere with its transmission to the Polish seamen concerned, and they knew nothing about his opposition.

As to the other objections to the validity of the obligation undertaken by the appellant company under Polish law, I think Finnemore J. was entitled to accept the views of Dr. Bloch and that his findings ought not to be disturbed.

I desire to add a few observations on the construction which should be placed on the certificate of the British Foreign Secretary. The appellant company's argument is that paragraph 2 of that certificate proves that the new Polish Government was formed on June 28, 1945, and that the recognition of that government by the British Government as from midnight of July 5–6, 1945, contained in paragraph 1 of the certificate, is therefore retroactive in all spheres to June 28, 1945. In my opinion this construction of the certificate contradicts the express recognition of the old government up to and including midnight of July 5–6, 1945, also contained in paragraph 1 of the certificate, and is therefore untenable. It is true that the recognition de jure by the British Government of a foreign government may in certain circumstances have a retroactive effect over a period before the recognition. In the absence of any intimation from the Foreign Secretary of the length of that period or the sphere in which the retroactive effect of the recognition is to operate it may be necessary for British courts to go into the facts on these matters. Each case must be decided on its own facts. The recognition of the two Polish Governments with which your Lordships are concerned and the spheres in which those governments have exercised acts of sovereignty are not the same as those in other cases, such as those of Russia, Spain or Abyssinia. The old government had exercised acts of sovereignty in England and on the high seas and elsewhere over Polish nationals and Polish ships from the time that that government came to England, and the recognition of that government in the Foreign Secretary's certificate was, in my opinion, a recognition of that sovereignty. Your Lordships are not concerned with acts by the old government, if there should be any, which trench upon or conflict with the de facto sovereignty which may have been acquired by the new government on its alleged formation on June 28, 1945. Nor is paragraph 2 of the certificate, even if read as recognizing the fact of the formation of the new government in Poland on June 28, 1945, a recognition that that government had sovereign powers outside Poland between June 28, 1945, and July 5–6, 1945. If it had been intended by the British Government to put an end to the recognition of the old government as from the alleged date of the formation of the new government, the Foreign Secretary would doubtless have said so, but, on the contrary, he certified expressly that the British Government recognized the old government up to and including midnight on July 5–6, 1945.

There are two cases which I think support the view that retroactivity of recognition should be confined to spheres of de facto control. In the case of *Banco de Bilbao* v. *Sancha*[43] General Franco's de facto control over Bilbao was held to oust the sovereignty of the Republican Government although at the material time the Republican Government was recognized by the British Government as the de jure government of the whole of Spain. Similarly, in the present case, even after the recognition of the new government as the de jure government of Poland, that government would not have had sovereign powers over Polish nationals in England if the old government had been still recognized as de facto in control of Polish nationals in England. And in the *Guaranty Trust Co.* v. *United States*,[44] the Supreme Court of the United States held that the retroactive effect of the recognition of the Soviet Government by the United States Government in 1933 did not extend to transactions which the Provisional Government of Russia had entered into with United States nationals within the United States. It is true that the decision was in part based upon the fact that the transactions had been entered into by the Provisional Government with United States nationals, but it was also based upon the fact that the transactions had been entered into in the territory of the United States in which the Provisional Government was recognized by the United States as a sovereign government and in which at the time the Soviet Government enjoyed neither control nor recognition.

I agree, therefore, that the appeal should be dismissed.

LORD MORTON OF HENRYTON. My Lords, in response to a request by the parties to this action, a certificate was issued by the Foreign Office and signed by the then Foreign Secretary, in the following terms: [His Lordship read the document and continued:]

The first question which arises on this appeal is as to the construction and effect of this certificate, and this is a question of English law. The document must, of course, be read as a whole, but in my view paragraph 1 contains three simple and unambiguous statements. If the Foreign Secretary had certified

[43] [1938] 2 K.B. 176.

[44] 304 U.S. 126, 140.

merely that His Majesty's Government recognized the Polish Provisional Government of National Unity as the government of Poland, the recognition might well have a retroactive effect, and in order to ascertain the date as from which such recognition became effective, it would be necessary for the court to go into past history and ascertain the date on which that provisional government acquired effective control of Poland. It seems to me, however, that no principle of retroactivity can come into operation in the case of a certificate in the terms of paragraph 1, which states in precise terms the moment "as from" which the new government became the recognized government of Poland. As I read the document, the Foreign Secretary has been at pains to exclude any possible retroactive effect by stating (1) that up to a particular moment of time His Majesty's Government recognized the old Polish Government as being the government of Poland; (2) that *as from* that moment of time His Majesty's Government recognized the new Polish Government as the government of Poland, and (3) *as from* that moment ceased to recognize the old Polish Government.

The formula employed in paragraph 1 differs in this respect from all the other Foreign Office certificates set out in the cases to which your Lordships were referred. The formula seems to me a most convenient one, and I see no reason to doubt that it was deliberately adopted in the present case. It fixes, once and for all, the moment at which the change over took place in the eyes of His Majesty's Government.

I have carefully considered whether paragraphs 2 and 3 of the certificate should lead me to form a different view as to the construction of paragraph 1, but I see no ambiguity in paragraph 1 and the following two paragraphs do not, in my view, raise any doubt as to its meaning. Paragraph 2 contains merely a statement of fact, viz., that on June 29, 1945, a message to the Prime Minister from the head of the Provisional Polish Government of National Unity, the terms of which are set out, was handed by the Polish Ambassador in Moscow to His Majesty's Ambassador in Moscow. The paragraph contains no comment upon the contents of that letter. If the Foreign Secretary had intended to convey to the parties to these proceedings a statement that the new government was effectively in control of any particular tract of country on June 28, 1945, I cannot believe that he would have taken this method of conveying it to the parties. I have no doubt that this certificate was carefully worded, with due regard to the purpose for which

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it was given, and I think that paragraph 2 means exactly what it says and no more. Paragraph 3 is merely a statement of advice which has been given to the Foreign Secretary. I cannot see that it throws any light upon the meaning of paragraph 1.

It was strenuously contended by Mr. Pritt that paragraphs 2 and 3 must have been put in for some purpose and that they serve no useful purpose whatsoever unless they are intended to qualify in some way the meaning which would otherwise attach to paragraph 1. I would agree that there seems no very good reason for the insertion of these two paragraphs, but in my view, if the Foreign Secretary had intended to qualify in some way the statements made in paragraph 1 he would not have done it by this extremely roundabout and obscure method. I can only suppose that it was thought well that the parties should have the information conveyed by paragraph 2, while paragraph 3 would appear to have been inserted, ex abundantia cautelae, to remove any idea that the Foreign Secretary was purporting to decide a question of law.

If I am right so far, there can be no doubt that up till midnight of July 5–6, 1945, so far as the courts of this country are concerned, Mr. Kwapinski continued to hold his office as minister. This being so, the appellant company continued to be "under his supreme management" and the board of management of that company continued to be his "executive organ" up to the same point of time.

On this footing, I am satisfied that the respondents are entitled to the sums which they claim, for the reasons which are about to be stated by my noble and learned friend, Lord Tucker. I agree that this appeal should be dismissed.

Lord Reid. My Lords, the case for the respondents depends in the first place on the courts of this country being still entitled to recognize as valid acts done in London on July 3, 1945, by Mr. Kwapinski as Minister of Industry, Commerce and Shipping in the Polish Government. The essential facts which give rise to this question can be shortly stated.

Early in the war the Polish Government had to leave Poland. After a time it came to London, where it remained until the summer of 1945. Throughout this period it was recognized by the British Government as the government of Poland and it exercised sovereign powers over Polish subjects who were outside enemy-occupied territory. By virtue of pre-war Polish legislation and decrees made by it during the war it had certain powers with regard to the Polish merchant navy, and this case is concerned with the exercise of those powers by Mr. Kwapinski as a minister of that government over the appellant company, which is a Polish shipping company. There is no doubt that the Polish Government in London in fact continued to exercise its powers until midnight of July 5–6, and that thereafter it ceased to be recognized by the British Government as the government of Poland and ceased to act as a government. From that time onwards the British Government recognized as the government of Poland a new Polish Government which had been set up in Poland. It is said that this new government was established in Poland on June 28 and that thereafter it exercised sovereign powers in Poland: but it did not and could not exercise any powers in Britain before it was recognized by the British Government.

The argument for the appellants is that it is a general principle of our law that the recognition of a new government of a foreign country is retrospective and dates back to the time when that new government was first established even though at that time the new government was not in fact in a position to exercise sovereign powers over all the subjects of that country. It is said that the British Government could not simultaneously recognize two different governments as the government of Poland and, therefore, if the recognition of the new government has to be dated back so also must the derecognition (if I may use the word) of the old government be dated back to the same time. The period between the establishment of the new government in Poland and its recognition by the British Government has been conveniently called the twilight period, and the appellants' argument is that, because our recognition of the new government must be dated back to the beginning of the twilight period, therefore our recognition of the old government must now be held by our courts to have been withdrawn from the beginning of that period, with the result that acts of ministers of the old Polish Government in this country during the twilight period must now be held to have been invalid and incapable of creating rights which the courts of this country can enforce. This appears to me to be a startling proposition, and, indeed, the appellants do not seek to carry it to its logical conclusion. They say that an exception has been recognized in the United States of America (*Guaranty Trust Co.* v. *United States*[45]): that this exception, though far reaching, is based not on principle but on convenience; that this exception might well be recognized in this country also; but that if it were it would not avail the respondents in this case. I shall have to return to this matter, and I shall only say at this stage that, if it is found that a principle cannot be applied without the introduction of an anomalous and far-reaching exception, one may be inclined to doubt the soundness of the principle.

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[45] 304 U.S. 126.

The respondents' answer is twofold. They admit that there is a general principle that recognition of a new foreign government is in certain respects retrospective; but they say, in the first place, that the form of the British Government's recognition of the new Polish Government in this case was such as to exclude that principle and, secondly, they say that the principle is much narrower than that put forward by the appellants and that *Guaranty Trust Co.* v. *United States*[45] is not an exception to the principle but an example of its application. They say that the principle does not involve any antedating of the withdrawal of the recognition of the old government.

The first argument for the respondents depends on the true meaning and effect of the certificate given by the Secretary of State for Foreign Affairs in connexion with this case. Such a certificate is conclusive at least to this extent. The courts of this country are bound to recognize as the government of a foreign country a government which has been recognized by the British Government and cannot recognize any government which has not been so recognized, and, where recognition has been withdrawn by the British Government from one government and accorded to another, our courts are bound to accept as facts statements of the British Government with regard to that change. I need not consider whether our courts are always bound to accept every statement in a Foreign Office certificate no matter what it may be because there is no suggestion that there is anything in this certificate which should not be accepted. But a certificate, like any other document, must be interpreted by the court in order to find out what it means.

This certificate contains three paragraphs. The first is: "1. Up to and including midnight of July 5–6, 1945, His "Majesty's Government in the United Kingdom recognized the "Polish Government having its headquarters in London as "being the Government of Poland, and as from midnight of "July 5–6, 1945, His Majesty's Government in the United "Kingdom recognized the Polish Provisional Government of

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" National Unity as the Government of Poland, and as from that " date ceased to recognize the former Polish Government having " its headquarters in London as being the Government of " Poland." If this paragraph stood by itself I should be inclined to think that it was intended to exclude any retrospective effect of the change of recognition. The certificate does not state that the new government was recognized at midnight of July 5–6. It states that it was recognized " as from midnight," and the certificate does not merely state as a historical fact that the old government was recognized up to that time: it goes on to state that " as from that date " the British Government ceased to recognize the old government. This appears to me to imply that the British Government still recognizes that the old government was the government of Poland up to that date and to be inconsistent with any intention that the withdrawal of recognition should be in any way retrospective.

But paragraph 1 does not stand alone. In paragraph 2 a message from the new Polish Government is quoted in which the head of that government states that it was formed on June 28. I cannot see what the purpose of the Secretary of State could be in quoting this message if he thought that the recognition of the new government had no retrospective effect. And paragraph 3 seems to make it impossible to suppose that the Secretary of State intended to prevent any retrospective effect, because he said that he was advised " that the question of retroactive effect " of recognition of a government is a question of law for decision " by the courts."

I find the interpretation of the certificate taken as a whole to be a matter of considerable difficulty, but one thing I think is clear. Whether or not it puts the respondents in a better position than they would be in if the certificate were in more general terms, it certainly does not put them in a worse position. So I shall assume that the certificate was not intended to modify, and does not modify, the general principle of the retroactivity of recognition, and I shall proceed to consider what this is. If the respondents can succeed on this issue then it will be unnecessary to determine the precise meaning of the certificate or what effect it would have if it were intended to modify the general principle.

There is ample authority for the proposition that the recognition by the British Government of a new government of a foreign country has at least this effect. It enables and requires the courts of this country to regard as valid not only acts done by the new government after its recognition but also acts done by it before its recognition in so far as those acts related to matters under its control at the time when the acts were done. But there appears to be no English authority which goes beyond that. I do not accept the argument for the appellants that this necessarily or logically involves antedating for all purposes the withdrawal of the recognition of the old government. I do not see anything strange or even difficult in our saying that we still recognize that the old government was the Government of Poland up to midnight of July 5–6 but that we also now accept the validity of certain acts done by the new government before that time and while it was still unrecognized by us. Apart from the distinction between recognition de jure and recognition de facto which does not affect this case, we cannot recognize two different governments of the same country at the same time, and the British Government did not in fact recognize both the old and the new government at the same time. But I do not think that it is inconsistent with this principle to say that the recognition of the new government has certain retroactive effects, but that the recognition of the old government remains effective down to the date when it was in fact withdrawn. I can see that there might be difficulties if the old government had purported before withdrawal of recognition to take some action with regard to matters already under the control of the new government, but that does not arise in this case.

Counsel for the appellants criticized views expressed in the Court of Appeal that the acts of the old government are valid at any rate unless and until the new government rescinds or repudiates them, and argued that this was a novel and unsound doctrine. There are, however, many legislative or administrative acts of a government which its successor can undo or nullify in one way or another. I doubt whether more was intended than that there might be cases in which the new government could do this. If it was intended to suggest that acts of the old government which could not have been repudiated or rescinded if they had been done before the twilight period can be repudiated or rescinded simply because they were done during the twilight period although relating to matters still under the control of the old government, then I see no reason why that should be so. But it is unnecessary to decide that because there is no evidence that the new government made any attempt to nullify the acts of the old government on which the respondents rely.

I ought also to notice another argument for the appellants. The domicile of the appellant company is in Gdynia, and it is said that the affairs of the company must be regulated by the law for the time being in force there: on July 3, 1945, Gdynia was under the control of the new government and the old government had no authority there. The short answer to that argument is that there is no evidence that the new government was in control of Gydnia on July 3, but, apart from that, I think that the argument is unsound. The respondents do not rely on any articles of association or statutes of the appellant company as conferring powers on the Minister; they rely on powers conferred on the Polish Government by Polish legislation, and the government entitled to operate such powers in London on July 3 was the government which was then recognized as the Government of Poland by the British Government.

I have derived much assistance from the judgment of the Supreme Court of the United States in *Guaranty Trust Co.* v. *United States*,[46] and I do not think that anything that I have said is in conflict with any part of it. The appellants found upon this sentence in that judgment [47]: "The argument thus ignores "the distinction between the effect of our recognition of a foreign "government with respect to its acts within its own territory "prior to recognition, and the effect upon previous transactions "consummated here between its predecessor and our own "nationals." They fasten upon the words "transactions con-"summated" and "our own nationals," and argue that if the transaction with the old government had not reached the stage at which it could be said to have been consummated, or if the transaction was not between the old government and a British subject, but was between the old government and a Polish subject then it was not within the ratio decidendi of the *Guaranty Trust* case.[48] I do not so read that judgment; it appears to me that those words were used because they fitted the facts of that case and the real distinction stated in the sentence which I have quoted seems to me to be between acts of the new government "within its own territory prior to recognition" and transactions by the old government "here" while it was still recognized. So reading the judgment I am in complete agreement with it. It follows that Mr. Kwapinski's acts on July 3, 1945, are no less valid than they would have been if done before the beginning of the twilight period.

The next question is the extent of Mr. Kwapinski's powers as Minister over the appellant company. That depends on the interpretation of a Polish statute of March 30, 1939, which conferred on the Polish Government a number of emergency powers. Some sections dealt with the period when war was imminent, others came into operation on the outbreak of war, and it is on one of the latter that the respondents rely. There is an agreed translation of it: "Article 19. In the circumstances set out in "article 13 (1)" (i.e., on the outbreak of war), "local government and private shipping undertakings shall be placed under "the supreme management (superior direction) of the Minister "of Industry and Commerce and their boards of management "shall become executive organs of the Minister of Industry and "Commerce." The appellants are a private shipping undertaking to which this article applied. The respondents say that it entitled the Minister to act on behalf of any such undertaking and to make a contract which bound the undertaking. The appellants deny this and say that it only entitled the Minister to give directions to the board of management, and if the board of management refused or delayed to obey the direction the Minister had to find some other way of enforcing his orders. Extensive expert evidence was given by Polish lawyers, and I have no hesitation in preferring the evidence on this matter of the respondents' expert. This evidence was accepted by Finnemore J., and I do not think it necessary to go over the ground again.

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[46] 304 U.S. 126.
[47] Ibid. 140.
[48] 304 U.S. 126.

It remains to consider whether Mr. Kwapinski did in fact undertake an obligation binding on the appellants by virtue of which the respondents are entitled to succeed in this action. The respondents rely on what was said and done at a meeting in London on July 3, 1945, at which there were present Mr. Kwapinski, Mr. Dabkowski, chairman of the trade union of the officers of the Polish Merchant Navy, and Mr. Fligiel, chairman of the seamen's trade union. It has throughout been assumed by all parties that the legal effect of what was said and done at that meeting must be determined by Polish law. I think it unnecessary to inquire whether that is right; I shall assume that it is.

In order to appreciate what happened on July 3 it is necessary to go back a little way. When it was seen that a new government was likely to be set up in Poland, many Poles thought that it might not be safe for them to return to Poland, and it appears to have been recognized by all concerned that if the Polish Merchant Navy came under the control of that new government, at least a considerable proportion of the crews would not be willing to continue to sail in Polish ships. The fate of these men gave much concern both to the old Polish Government and to the officials of the officers' and seamen's trade unions. When it was decided that the engagements of civil servants of the old Polish Government should be terminated and that they should be given three months' salary by way of compensation, the question of making similar arrangements for employees of Polish shipping companies was considered. The Polish Government had agreed to pay the civil servants' compensation but did not agree to pay anything to employees of the shipping companies. Those companies then held large sums of money in this country. The Council of Ministers of the Polish Government at a meeting on June 25, having settled the matter of compensation to civil servants, passed a resolution authorizing the Minister of Industry, Commerce and Shipping to pay to employees of Polish shipping enterprises gratuity on an equal footing to that payable to State employees, with the proviso that this gratuity should be paid to them out of moneys possessed by these enterprises.

The appellant company was then being managed by Mr. Plinius. Mr. Plinius had been deputy general manager before the war and became curator of the company during the war. When Mr. Kwapinski discussed the resolution of the Council of Ministers with him he objected to paying compensation to the crews of his ships because he feared that if they were given any encouragement so many of them would leave his ships that they would be immobilized. I think Mr. Plinius made it quite clear throughout that he refused to commit the company to payment of compensation, and, if the appellants are bound to pay, it is solely because Mr. Kwapinski imposed that obligation on them. The question is whether he did this on July 3.

In considering the evidence about the meeting on July 3 one must, I think, bear in mind that Mr. Kwapinski knew that his power as Minister might not last very long. He was anxious to ensure that compensation would be paid and he knew that he would get no co-operation in this matter from Mr. Plinius. The trade union officials whom he met were also anxious to have the matter settled, and I think that it is proved that Mr. Kwapinski believed that he had power to act over the head of Mr. Plinius and make a contract on behalf of the Polish shipping companies, including the appellants. In these circumstances it is not very likely that he would refrain from doing so.

Within 24 hours of the meeting Mr. Dabkowski typed out a detailed note of what had taken place; he had to report the result of the meeting to a meeting of his members on the next day. It is not suggested that Mr. Dabkowski was not an honest witness, and both he and Mr. Fligiel say that this note is accurate. Mr. Kwapinski was giving evidence from memory after a lapse of some four years; his evidence is not so detailed as the note but is not inconsistent with it on any important matter. If all this evidence is accepted as substantially accurate I think that there can be really no doubt that Mr. Kwapinski intended to enter into an obligation on behalf of the company, that he declared his intention to Mr. Dabkowski and Mr. Fligiel, and that they accepted his declaration. There were questions about their authority to do that and also whether they were acting on behalf of their unions or on behalf of the members of their union; I think that they were acting on behalf of their members and, under Polish law, had authority to do so. Under Polish law that constituted a binding bilateral obligation which conferred rights on the members of the union enforceable against the appellants. Then comes the question: What was the substance of the obligation? The appellants say that Mr. Kwapinski only undertook to direct Mr. Plinius to pay and that, as the old government ceased to exist before any effective direction was given, the agreement has resulted in nothing binding on the appellants. I am of opinion that this view is inconsistent with the evidence and I reject it.

It was held in the Court of Appeal that the agreement was only an agreement that a telegram should be sent. At the meeting Mr. Kwapinski dictated a telegram and this was later sent to all ships of the Polish Merchant Navy to be communicated to the officers and seamen. It contained a declaration that in the event of their leaving their ships owing to the political situation they should be entitled to receive suitable compensation, and it is not disputed that in the context that meant three months' salary or wages. I think that this interpretation is based on too narrow a reading of some passages in Mr. Kwapinski's evidence. In other passages he says that he undertook obligations to the crews, and this appears to me to be borne out by the rest of the evidence. It makes no difference to the result of the case of the first respondent whether one accepts the view of the Court of Appeal or the view of Finnemore J., but it might make a difference in the case of the second respondent.

I agree with the findings of Finnemore J. I think that Mr. Kwapinski, acting for the shipping companies, made a contract

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with Mr. Dabkowski and Mr. Fligiel, acting for those of their members who were then employed by those companies, by which the appellants became bound to pay compensation to those of their crews who chose to leave their service on account of the situation created by the change of government, and that the telegram was intended to inform the crews of this agreement. The appellants say that certain subsequent acts and omissions of those present at the meeting are inconsistent with their having believed that such a contract had been made. It is true that some of these acts and omissions are not quite what one might have expected, and if the evidence about the meeting had been equivocal this might have turned the balance; but I have not found anything irreconcilable with the parties having believed that a contract had been made, and I cannot give any decisive weight to this evidence.

The appellants then argued that, even if there were an agreement, it is not effective because it was not in the form required by Polish law. In the first place they say that it was an agreement of donation and that to be effective it had to be in the form of a notarial act. But the code of obligations does not require this if the donation satisfies either a moral duty, a propriety of behaviour or custom. Looking to the service given by Polish crews during the war I think that there was a moral duty or at least a propriety of behaviour in giving this compensation, and I find nothing in the expert evidence to require these expressions to be interpreted in a way which would exclude this case. Secondly, the appellants say that the agreement was a collective agreement and such an agreement must be in writing. There was a great deal of expert evidence about this. I agree with Finnemore J. in preferring the evidence of Dr. Bloch. As I understand his evidence, a collective agreement is something which covers the future generally and an agreement by which a concession is given on a single occasion to those already in the master's employment is not a collective agreement under Polish law. This agreement was with regard to a single occasion, the change of government, and, as I have already said, I think that it only applied to men employed by the company when it was made; those of them who left their ships in consequence of the change of government got the compensation.

On this view the agreement did not cover the respondent Krupka because he only joined the appellants' ship after the agreement had been made. He left on learning of the telegram to which I have referred, and he can only succeed if the telegram, though primarily a notification to the crews of the agreement, can also be read as a new and independent offer to persons not covered by the agreement. There are several matters about Krupka's case about which I still have some doubt, but, as we were informed that none of the cases still outstanding resembles Krupka's case, I do not think that it would be useful if I pursued this matter. I therefore agree with your Lordships that this appeal should be dismissed.

LORD TUCKER. My Lords, I am in complete agreement with the views expressed by my noble and learned friend on the Woolsack with regard to the interpretation and effect of the Foreign Secretary's certificate concerning the recognition by His late Majesty's Government of the new Polish Government.

The other issues in the case have throughout been assumed to depend upon Polish law, and I am content to deal with them on this basis without thereby expressing any opinion as to the correctness or otherwise of this assumption. They are accordingly questions of fact and have been most fully and carefully dealt with by the trial judge, who had the advantage of seeing and hearing the expert and other witnesses. I accept his conclusions, but venture to think they require to be supplemented with regard to the claim by the respondent Krupka.

So far as Boguslawski is concerned, his claim was held to be justified on the basis of an agreement made on July 3, 1945, by Kwapinski on behalf of the appellant company with the representatives of the unions concerned. This agreement must, I think, having regard to the evidence and conduct of the trial, be regarded as covering only those members of the unions who were serving on Polish ships on that date. It was on this basis that Dr. Bloch considered that the agreement was not a "collective agreement."

Krupka was not serving on a ship on July 3 and, therefore, was not covered by that agreement. He is none the less in my opinion entitled to recover. Kwapinski caused a telegram to be sent out and read to the members of the crews. He did this as the authorized agent of the appellant company, whose existence and legal status has never varied throughout. The telegram was read by a ship's officer in accordance with the instructions contained therein. Its terms covered all the members of the crew, including Krupka, who heard it. It is immaterial that, by the date when it was read, Kwapinski had ceased to represent the company; the offer when made was the offer of the company, and it was never withdrawn before Krupka accepted it by leaving the ship.

I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Constant & Constant; Hilder, Thompson & Dunn.*

J. C.*
1952
Oct. 8.

EDIE MAUD LEEDER . . . . . . APPELLANT;

AND

NANCE ELLIS . . . . RESPONDENT.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Australia (New South Wales)—Family provision—Testator's estate insolvent—Order refused—Application to adduce fresh evidence—Principles applicable—Discretion—Testator's Family Maintenance and Guardianship of Infants Act (No. 41 *of* 1916—*No.* 30 *of* 1938), *N.S.W., s.* 3 (1)—*Equity Act (No.* 24 *of* 1901—*No.* 41 *of* 1947), *N.S.W., ss.* 82, 84.

The estate of a testator, who died in July, 1949, consisted only of certain furniture and a cottage which was valued by the Valuer-General at the date of the testator's death, and accepted for probate purposes, at £1,000 and was subject to a mortgage on which about £887 was owing. By his will, dated June 27, 1947, the testator appointed the appellant the executrix and trustee of his will, and after making certain bequests of furniture he left the whole of his residuary estate to the appellant absolutely. At the date of his death the cottage was subject to the Land Sales Control Act, 1948, which ceased to apply to it on September 1, 1949. In March, 1950, his widow took out a summons under the Testator's Family Maintenance and Guardianship of Infants Act, 1916–38 of New South Wales, asking that provision be made for her maintenance out of the estate of her husband. In compliance with rule 5 of the Rules made under the Act the appellant as executrix filed an affidavit in which, inter alia, she stated the value of the cottage as £1,000, and the amount owing on the mortgage, and also alleged that the testator was indebted to her in sums totalling £497 odd.

The trial judge having dismissed the application on the ground that on probate values "the estate is insolvent and it would be "nothing more than a futility to give it to the widow," she

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* *Present*: LORD PORTER, LORD OAKSEY, LORD TUCKER, LORD ASQUITH OF BISHOPSTONE and LORD COHEN.

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v.
Nance Ellis.

appealed to the Full Court of New South Wales and on that appeal applied that the court might, under section 84 of the Equity Act, 1901–47 (which corresponds very closely with Or. 58, r. 4, of the English R.S.C.), admit further evidence consisting of affidavits of valuers to the effect that the cottage, no longer subject to the Act of 1948 at the date of the trial, was worth about £2,500. The Full Court refused to receive the fresh evidence, and in the result dismissed the appeal. A further appeal by the widow to the High Court of Australia was allowed, and the whole estate was awarded to her, the court being unanimously of opinion that she was entitled to succeed on the evidence before the trial judge, bearing in mind that the Land Sales Control Act of 1948 did not then apply to the cottage. A majority of the judges also considered that the fresh evidence should have been admitted. On appeal by the executrix:—

Held, that the principles which must guide an appellate court when considering an application for leave to adduce further evidence in order to secure a retrial of a case before a jury were of general application and applied to an appeal of the present nature from a judge alone, and that the matter being one within the discretion of the Full Court, the High Court should not have interfered with the exercise of that discretion except in accordance with the well-recognized principles applicable in such cases.

Dictum of Street C.J. in the Full Court that "parties should "not be permitted to protract proceedings indefinitely by taking a "chance on the hearing in the lower court as to whether the "evidence is sufficient, and on finding it insufficient should then be "able to come to the appellate court and ask for fresh evidence "to be admitted, which was available at the time and in respect of "which no difficulty arose in the way of putting that evidence before "the court, and seek to have the matter reopened on that ground," approved.

Dictum of Jessel M.R. in *Sanders* v. *Sanders* (1881) 19 Ch.D. 373, at p. 380, applied.

Held, secondly, that on the facts the High Court were not justified in reversing the decision of the trial judge, supported by the evidence before him and confirmed as it was by the Full Court. The trial judge was justified in reaching the conclusion that the estate was insolvent and in dismissing the application.

Order of the High Court of Australia (1951) 82 C.L.R. 645 reversed.

Appeal (No. 11 of 1952) from an order of the High Court of Australia (August 3, 1951), reversing an order of the Full Court of the Supreme Court of New South Wales (November 1, 1950), which had affirmed an order of Sugerman J. in the Supreme Court (August 4, 1950), dismissing an application by the respondent under the Testator's Family Maintenance and Guardianship of Infants Act, 1916–38, for maintenance out of the estate of her deceased husband.

The following facts are taken from the judgment of the Judicial Committee:—The testator, Herbert Ellis, the terms of whose will gave rise to these proceedings, died on July 28, 1949. He had been married once only and left him surviving his widow, the respondent, and three children—a son aged 33 and married, a married daughter and a younger daughter, aged 17, who lived with her parents. By his will, dated June 27, 1947, the testator appointed the appellant executrix and trustee of his will; he bequeathed to her two specified articles of furniture and to his widow the rest of his furniture; he left the whole of his residuary estate to the appellant absolutely. Probate was granted to the appellant on February 15, 1950. The estate of the testator consisted only of the furniture (which was claimed by the respondent to be her own property) and a cottage which was the matrimonial home and which was valued as at the date of the testator's death by the Valuer-General at £1,000 and was subject to a mortgage on which there was owing about £887.

The appellant had lived with the testator and his family in the matrimonial home from some time in the year 1931 until January, 1933, when she left, but thereafter the testator spent almost every weekend with the appellant from Saturday morning until Sunday evening. The rest of his time he lived with his wife. He had been an invalid pensioner from 1943 until his death.

Those being the circumstances, on March 8, 1950, the respondent took out a summons under the Act asking that provision be made for her maintenance. In her affidavit in support of that summons she said that she had no property from which she derived income and that her only income was a widow's pension of £1 17s. a week and any contributions her unmarried daughter or her son might choose to make. She referred to the Valuer-General's valuation of the cottage at £1,000 and made her claim to all the furniture in the house. In the course of her affidavit she said that she had received substantial support from her son during her husband's lifetime after her husband became an invalid. She did not specify the nature of the support but the context indicated that the support took the form of periodical payments. The son, who was called, did not give any evidence to suggest that he was willing to provide any substantial capital sum.

Rule 5 of the rules made under the Act required the appellant as executrix when entering an appearance to the summons to file an affidavit setting out the nature and amount of the estate and giving such information as might be available to her as to the family of the testator and the persons beneficially entitled to the estate. In compliance with the rule the appellant filed an affidavit in which, inter alia, she valued the cottage at £1,000 "as per the Valuer-General's certificate" and stated that the sum of £886 13s. 4d. was owing under the mortgage thereon. She also claimed that the testator was indebted to her in sums totalling £497 13s. 7d. Those debts had not been disclosed in the affidavit lodged with the application for administration, but the trial judge accepted as satisfactory the explanation of the omission which she gave in cross-examination. The appellant filed a further affidavit dealing with the ownership of the furniture and with her relationship with the testator.

At the date of the testator's death the cottage was subject to the Land Sales Control Act, 1948, which in effect restricted its value to what would have been a fair and reasonable price for it on February 10, 1942. That Act ceased to apply to the cottage on September 1, 1949.

Sugerman J. dismissed the application on the ground that the estate was insolvent, and his decision was affirmed by the Full Court (Street C.J., Maxwell J. and Roper C.J. in equity), who also refused to admit further evidence relating to the value of the cottage. A further appeal by the widow to the High Court of Australia (Dixon, McTiernan, Williams, Webb and Kitto JJ.) was allowed on the ground that she was entitled to succeed on the evidence before the trial judge, and three judges of the High Court (Dixon, Williams and Kitto JJ.) also considered that the fresh evidence should have been admitted. The executrix appealed.

1952. July 1, 2, 3, 7 and 8. *G. E. Barwick Q.C.* (of the Australian Bar) and *Peter Foster* for the appellant. With regard to section 3 of the Act, this being a discretionary power, it could not be said that a court which was not satisfied that there were any assets to dispose of erred in refusing to make an order. It is conceded that if there had been assets in the estate the widow could make out a case that she had been left without adequate support. Sugerman J. exercised a discretion without any misconception of fact. The operative part of the High Court's order made no attempt to comply with the requirements of section 6 of the Act, namely, that every order shall specify "(*a*) the amount "and nature of such provision; (*b*) the part or parts of the estate "out of which such provision shall be raised or paid . . ." and (*c*) "state the conditions, restrictions, or limitations imposed "by the court." The order has to specify all of those things.

Whilst it is not argued that there is no power to award the whole of the estate, it is not conceded that there is the power.

The first point is that the existence of an estate which is to be dealt with by the court must be shown by the applicant for an order under section 3—the court must see that there is an estate, and the extent and nature of it are critical factors in determining whether an order should be made. If it is a very small estate there is not room for making an order; but assuming a sufficient estate, while there is no rule as to the paramountcy of the widow's claim, no doubt a widow being left without adequate provision would warrant an intervention. It goes no further than that. Next, section 3 confers a discretionary power, and it confers two relevant discretions: (i) whether any order should be made at all; (ii) as to the nature of the order if one is made; it is to be "as the court thinks fit." It follows from the judgment in *Bosch* v. *Perpetual Trustee Co.*[1] that the existence of an estate is a condition of the exercise of the discretion: an essential inquiry is what property has the testator left? *In re Allardice, Allardice* v. *Allardice*[2] is quoted in *Bosch's* case.[3] There is no difference in policy between the New South Wales Act and the English Act, which is to enable the court to give effective provision for maintenance, and, if it cannot, it is not called on to intermeddle. *In re Vrint*[4] and *In re Joslin*[5] are cases of the exercise of discretion where the estate was very small. The jurisdiction being discretionary, there was no ground for disturbing the discretion of Sugerman J. as confirmed by the Full Court on a rehearing. Discretion is never interfered with unless it is in exercise of a misdirection on a point of law or a misconception on a point of fact: *Evans* v. *Bartlam*[6]; *Bosch* v. *Perpetual Trustee Co.*,[7] and *In re Ryan, decd.*,[8] which last is crucial, and in which it was said that "the jurisdiction under the Act [of 1916] is given to the "Supreme Court in its equitable jurisdiction, and in cases which "are brought on appeal to the Full Court that court must exercise "its discretion, and should not hesitate to reverse the decision of "the judge of first instance if it is satisfied that that discretion "has not been exercised in the way in which its own discretion "would be exercised."[9] And in *In re the Will of F. B. Gilbert, decd.*[10]: "It was said for the applicant, that, since by section 3

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[1] [1938] A.C. 463.
[2] (1910) 29 N.Z.L.R. 959, 969–70.
[3] [1938] A.C. 463, 477.
[4] [1940] Ch. 920, 924.
[5] [1941] Ch. 200.
[6] [1937] A.C. 473, 480–1.
[7] [1938] A.C. 463, 483.
[8] (1923) 23 N.S.W.St.R. 354.
[9] Ibid. 357.
[10] (1946) 46 N.S.W.St.R. 318, 322.

" the question whether any and if so how much provision should " be made for an applicant is in terms left to the discretion of " the court, it is only in the most exceptional circumstances that " a court of appeal could regard itself as justified in interfering " with the exercise of a discretion by a judge of first instance— " only where he has misapplied the law, or his order is likely to " lead to a miscarriage of justice "; and *Evans* v. *Bartlam* [11] was referred to. That view is adopted. It could not be said that Sugerman J. or the Full Court so exercised their discretion as to warrant interference by the High Court sitting as a court of appeal consistently with the principles in the above cited cases.

The High Court also disturbed the discretion of the court below on the reception of the new evidence. The power to hear further evidence is conferred by sections 82 and 84 of the Equity Act, 1901–47, which in substance correspond respectively with rules 1 and 4 of Ord. 58 of the R.S.C. of England. These provisions have been discussed in earlier cases: in *Nash* v. *Rochford Rural District Council* [12] Lord Cozens-Hardy M.R. said: " We " are now asked . . . on the assumption that apart from further " evidence the plaintiff would fail, to allow him to adduce further " evidence in support of this case. It is within our power, no " doubt, to do so on special grounds, but this is a jurisdiction " which ought to be exercised with the greatest possible care, " particularly in a case where the issue between the parties has " been decided by a jury "; and in the same case Scrutton L.J. said that " the principle which I have to apply is, I think, the " principle stated by Lord Chelmsford in the case of *Shedden* v. " *Patrick* [13] in these words: ' it is an invariable rule in all the " ' courts, and one founded upon the clearest principles of reason " ' and justice, that if evidence which either was in the possession " ' of parties at the time of a trial, or by proper diligence might " ' have been obtained, is either not produced, or has not been " ' procured, and the case is decided adversely to the side to " ' which the evidence was available, no opportunity for producing " ' that evidence ought to be given by the granting of a new " ' trial.' " [14] [Reference was also made to *Evans* v. *Benyon* [15]; *E. H. Lewis & Son Ld.* v. *Morelli* [16]; *Rex* v. *Robinson*,[17] and *Sinanide* v. *La Maison Cosmeo*.[18]] It is going rather far to say what Dixon J. in the High Court said of the last cited case, that it "provides an example of a case where it was thought proper "to admit evidence simply because it appeared just to do so." Lastly, *Orr* v. *Holmes* [19] throws into very high light the departure in principle which it is suggested the present judgment of the High Court involves, for in that case Latham C.J. said: "The "objections to granting such an application [for a new trial] are "obvious and the rule has been strictly applied that a new trial "should not be granted on such a ground [of discovery of fresh "evidence] if by the exercise of reasonable diligence the 'fresh' "evidence could have been discovered in time to be used at the "original trial." [20] These principles differ little in expression in Australia and in this country.

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[11] [1937] A.C. 473, 480–1.
[12] [1917] 1 K.B. 384, 390.
[13] (1869) L.R. 1 Sc. & D. 470, 545.
[14] [1917] 1 K.B. 384, 393.
[15] (1887) 37 Ch.D. 329, 345.
[16] [1948] 2 All E.R. 1021, 1023.
[17] [1917] 2 K.B. 108, 110.
[18] (1928) 44 T.L.R. 574.

Summing up the points: (i) The existence of a disposable estate—a surplus over known debts—must be shown if an order of any kind is to be made. (ii) A court which is not satisfied that such a surplus exists can in its discretion dismiss the application. (iii) An applicant who fails to satisfy the court that there is such a surplus has no claim to an order under the Act. (iv) A court is entitled and, indeed, bound, when considering whether an order should be made under the Act, to take account of the moral obligations of the deceased to other persons as well as his obligations, legal or moral, to his wife and children. It is wrong to say that a judge erred who took those things into consideration. (v) The court should not make any order where the amount of the estate is so small that no substantial provision for maintenance could be made. (vi) Sugerman J. was right in dismissing the application on the material before him, either (a) because he was not satisfied that there would be any surplus at all, or (b) because he was not satisfied that there would be such a surplus as would satisfy the deceased's financial obligations to the executrix as a creditor, whether provable or not, or leave any substantial sum whereout to make provision for the widow. (vii) Alternatively, in any case Sugerman J. in exercising his discretion in refusing an order did not err in principle, did not misapprehend the facts, nor did his order on the materials before him so clearly work an injustice as to call for correction on appeal. *In re the Will of F. B. Gilbert, decd.*[21] is to be preferred to *In re Ryan, decd.*[22] (viii) The principles governing the reception of further evidence are the same under sections 82 and 84 of the Equity Act as they are in applications for a new trial at common law. (ix) If the further evidence was available, or might with reasonable diligence have been available to the applicant for leave to adduce it, the mere fact that its reception would assist the Court of Appeal on a rehearing to arrive at the true facts affords no special ground within the meaning of section 84, and special leave to adduce such evidence in those circumstances should not be given. (x) The case is a fortiori if the applicant for such leave has taken his chance in the proceedings subject to the appeal and has abstained from calling the proposed evidence. (xi) These principles spring from a public policy in the administration of justice common to all courts and to all litigious proceedings. (xii) In any case, the absence of surprise and the availability of the evidence to the applicant at the time of the hearing, or the fact that the applicant has taken his chance without the evidence, afford good grounds for the exercise of a discretion to refuse special leave to adduce the evidence. (xiii) The High Court were in error in holding that the further evidence should have been admitted, or alternatively, in interfering with the discretionary order of the Full Court refusing leave to adduce it. (xiv) The High Court were in error in making an order giving the whole estate to the widow, (a) because the order of Sugerman J. was right, or (b) because there was no ground to interfere with his exercise of discretion. (xv) The High Court were in error in ordering the executrix to pay costs. (xvi) The appeal should be allowed; the order of the High Court set aside in toto; the order of Sugerman J. restored, and the respondent should be ordered to pay the costs of the appeal to the Full Court and to the High Court and to this Board.

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[19] (1948) 76 C.L.R. 632.

[20] Ibid. 635.

[21] 46 N.S.W.St.R. 318.

[22] 23 N.S.W.St.R. 354.

Sir Frank Soskice Q.C. and *J. G. Le Quesne* for the respondent. Under section 3 of the Act the judge has to take into account all the circumstances, and it is very important, in considering whether the discretion has been properly exercised, that the whole circumstances of the case should have been before the court. There was at any rate some estate here. Sugerman J. had before him, and there is before the Board today, as strong a case on the merits as can well be conceived. The English section limits the provision to the net estate; the New South Wales statute does not do so. Looking at the latter Act, prima facie, it cannot be said to be a right exercise of discretion for a judge who has a very strong prima facie case made out before him simply to say "I won't make an order because my mind is left "in a state of uncertainty as to the amount of the estate." Dixon J. in the High Court rightly said that "if the court thinks "that a claim is justified it should seek ways to give effect to it";

and McTiernan J. said that " taking all the circumstances of the " case, justice requires that an order should be made unless there " is proof that there is no surplus of assets to meet it. In the " absence of any definite evidence that the order would be futile, " I think it should be made." That, it is submitted, is the right exercise of discretion. " In my judgment, in a case like this . . . " it is the duty of executors to file an informative affidavit telling " the court what is known to them, and what it is necessary for " the court to know in order to deal properly with the matter: " *In re Simson, decd.*"[23]: what Vaisey J. there said is directly in point in the present case. To deal properly with this matter it was crucial that the real value of the cottage should be available to the court. The duty of seeing that that was done is put fairly and squarely on the shoulders of the executrix: rule 5 of the Rules made under the Act is a statutory statement of what Vaisey J. said in *Simson's* case.[23] The Act could easily have said that no order shall be made if no net estate exists: it does not say so.

The High Court was right in holding that the Full Court ought to have admitted the fresh evidence; if, therefore (contrary to our submission), Sugerman J. ought not to have made an order in the widow's favour on the evidence before him, the case ought to be remitted to him for consideration of the fresh evidence. Sugerman J. exercised his discretion wrongly, because he put to himself the wrong test. He was in a state of uncertainty whether, supposing that he made an order, it would be a futile one, and if he was in that state of mind he did not approach the matter on a proper basis. Dixon J. in the High Court was right when he said that " the case was clearly one in which, on the evidence before " him, his Honour should have made an order in her favour and " in all the circumstances given her the whole estate." His conclusions were well supported by the evidence. If there is a case on the merits the court should make an order unless it would be a completely futile one. The New South Wales courts have taken the view that the advantage of living in the family home, in which an applicant may have lived for many years and towards the cost of which she has contributed, cannot be disregarded; it is something of value which the court should consider: *In re Lenehan, decd.*[24] That is the main thing which is sought for the widow in this case. The evidence shows that at least there was some reason for doubting how much was owed by the deceased to the appellant executrix, and the probability is that an order

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[23] [1950] Ch. 38, 43–4.

[24] (1950) 50 N.S.W.St.R. 318.

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would have been effective, there being a strong case on the merits.

If Sugerman J. did not act on a wrong principle, then, and then only, the respondent has to rely on what Lord Atkin said in *Evans* v. *Bartlam*,[25] that "while the appellate court in the "exercise of its appellate power is no doubt entirely justified in "saying that normally it will not interfere with the exercise of "the judge's discretion except on grounds of law, yet if it sees "that on other grounds the decision will result in injustice being "done it has both the power and the duty to remedy it." That statement is perfectly general and not limited in any way, and has since been acted on: *Griggs* v. *Petts* [26]; *Charles Osenton & Co.* v. *Johnston.*[27] The present was a case in which at least injustice was done: as Dixon J. said: "Since the Full Court was "of opinion that it ought not to reverse the order of Sugerman J. "on the evidence before him, it became necessary to admit the "fresh evidence if the Full Court was to be placed in a position "to remedy an injustice." *In re Joslin*,[28] which was cited for the appellant for the proposition that where there is a small estate an order should not be made, is no authority for that proposition; in *In re Vrint* [29] the estate was also extremely small, and that case does not throw any light on the order Sugerman J. should have made.

Under section 84 of the Equity Act the court shall admit further evidence if there are special grounds. This is a clear case where there are such grounds. The executrix was under a duty to put before the court such information as was available as to the amount of the estate so as to enable the court to make a proper order: *Simson's* case.[30] The special ground here is that the evidence before Sugerman J. was left on its face incomplete. It was the duty of the executrix under rule 5 to supply this deficiency in the evidence, and nothing could excuse her from discharging her responsibility. She did not comply with rule 5. The Full Court erred, for instead of asking themselves whether there were special grounds within the meaning of section 84, they simply said that it is a maxim that there must be an end to litigation and dismissed the application. It was an error of discretion for them to do so. The totality of the circumstances was such as to constitute special grounds within the meaning of the

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[25] [1937] A.C. 473, 480–1.
[26] [1940] 1 K.B. 198.
[27] [1942] A.C. 130, 151.
[28] [1941] Ch. 200.
[29] [1940] Ch. 920.
[30] [1950] Ch. 38.

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section. *E. H. Lewis & Son Ld.* v. *Morelli*[31] stated the principle: see also *In re The Neath Harbour Smelting and Rolling Works.*[32] Notwithstanding the principle, there is an overriding power in any appeal court to do justice. The Full Court held that they were bound by what were simply rules of practice and no more, and in applying them did not admit evidence which otherwise they would have admitted. So, again, the Full Court did not exercise its discretion on the right principles, and the High Court was entitled to intervene. The High Court said that they were bound to see that a technical rule of practice did not prevent them from getting at the truth. As Jessel M.R. said in *Sanders* v. *Sanders*[33]: " Speaking for myself, I think that when " an application is made for an indulgence, the moral elements " of the case ought to be taken into consideration. I am more " inclined to grant it when what appears to be a substantially " good and honest case is in danger of being defeated on technical " grounds." The evidence ought to be allowed if a refusal to admit it will result in an otherwise good case being defeated on technical grounds. If the respondent is wrong on the main point, the Board should not allow the appeal, but say that the High Court were right in their view on the admission of the further evidence and order the case to go back for retrial.

Le Quesne, following, referred to *In re Dennis Mulloy, decd.*[34]

G. E. Barwick Q.C. in reply. It is not a question of there being a strong case on the merits, but whether the widow brought herself under the statute. Rule 5 can do no more than require the executrix to tell what she knows—to place before the court her executorial knowledge—and in this case she did that. Once she has filed an affidavit there is no continuing duty to keep it up to date. The Full Court rightly refused to admit the fresh evidence, and did not exercise their discretion on the wrong principle.

October 8. The judgment of their Lordships was delivered by LORD COHEN. This appeal raises a point under the New South Wales statute, the Testator's Family Maintenance and Guardianship of Infants Act, 1916–1938 (hereinafter referred to as " the " Act "). Section 3 (1) of the Act, so far as material, is in the following terms:—

" If any person (hereinafter called ' the Testator ') dying or " having died since the seventh day of October, one thousand

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[31] [1948] 2 All E.R. 1021.

[32] (1885) 2 T.L.R. 94.

[33] 19 Ch.D. 373, 381.

[34] (1928) 28 N.S.W.St.R. 546.

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"nine hundred and fifteen, disposes of or has disposed of his "property either wholly or partly by will in such a manner that "the widow, husband, or children of such person, or any or all "of them, are left without adequate provision for their proper "maintenance, education, or advancement in life as the case "may be, the court may at its discretion, and taking into consideration all the circumstances of the case, on application by "or on behalf of such wife, husband, or children, or any of them, "order that such provision for such maintenance, education, and "advancement as the court thinks fit shall be made out of the "estate of the testator for such wife, husband, or children, or "any or all of them."

Section 4 (1) enacts that every provision made under the Act shall, subject to the Act, operate and take effect as if the same had been made by a codicil to the will of the deceased. Section 5 (1) provides that the court may not entertain an application by a party claiming the benefit of the Act unless in the case of a party dying after the passing of the Act the application is made within 12 months from the date of the grant or re-sealing in New South Wales of probate of the will. Section 6 (1) requires that an order making any provision under the Act shall, inter alia, specify the amount and nature of such provision and the part or parts of the estate out of which such provision shall be made. Section 6 (4) enables the court, on the application of the executor or of a person beneficially interested in the estate, to rescind or alter any order making any provision under the Act.

Their Lordships do not find it necessary to refer to any other provision of the Act, but would observe that neither section 6 (4) nor any other provision in the Act enables the court to re-open the matter at the instance of an applicant under the Act whose application has been rejected.

[His Lordship then stated the facts set out above and continued:] The case came before Sugerman J. (who, their Lordships were informed, happened to be the judge in New South Wales appointed to deal with Land Valuation matters), on July 28, 1950. The respondent and her son were called, and so was the appellant. The cross-examination of the appellant was directed mainly to the validity of the debts claimed by the appellant to be due from the estate, but it also emerged from the cross-examination that the financial position of the appellant was far more secure than that of the respondent. In these circumstances it is not surprising that the trial judge expressed the view, which Mr. Barwick, for the appellant, did not seek to contest, that if there were available in the estate the means of making further provision for the respondent, that should be done. Nonetheless, the trial judge dismissed the application.

Dealing with the question of the debts claimed by the appellant to be due to her he said: "Even if Miss Leeder's claim is "not supportable for its full amount, it appears to be supportable "as to a substantial part of it, at least an amount of somewhere "between £200 and £300." He then asked himself the question whether there was likely to be any surplus out of which provision for the respondent could be made, and answered the question in the negative, saying: "On probate values, the estate is clearly "insolvent. It is possible, and perhaps likely, that the cottage "would now realize more than the probate valuation which was "made while land sales control was still in force. How much "more does not appear, and there is no evidence that it would "be so much as to leave a surplus. Indeed, that is not how the "applicant's case has been conducted, and her counsel has said "that the interest in the cottage would not be worth much at "the present day. The applicant has sought rather to cut down "Miss Leeder's claim."

Later on in his judgment he said: "But since it does not "appear that there is anything out of which further provision "might be made for the widow, and since the only result would "appear to be to disturb the arrangements which the testator "has made partly with a view to simplifying the discharge of his "obligation to Miss Leeder, in my opinion no order should be "made in this application."

It was argued that the insolvency of the estate was not the real ground of his decision and that he was influenced largely by the "moral" considerations indicated in the passage of his judgment last cited. It was suggested that he ought not to have had regard to these considerations. Their Lordships think that having regard to the wide words of the section such matters are not excluded from the judge's consideration. Their weight is another question, but in this case their Lordships think it is reasonably clear from the judgment of Sugerman J. that the basis of his judgment was his finding that the estate was insolvent. This conclusion is supported by the fact that, dealing with a further argument advanced by counsel after he had concluded his judgment, he said: "The estate is insolvent and it "would be nothing more than a futility to give it to the widow."

From this decision the respondent appealed to the Full Court of New South Wales. On this appeal she sought to adduce further evidence consisting of the affidavits of two qualified valuers, one of whom swore that the house was worth £2,500 with vacant possession and £1,750 without it, while the other estimated the then market value of the house at £2,450. The application to adduce fresh evidence fell within section 84 of the Equity Act of 1901, which corresponds very closely with Ord. 58, rule 4, of the Rules of the Supreme Court in England. Under that section the order appealed from, being an order on the merits at the hearing, the fresh evidence could only be admitted on special grounds and with special leave.

When the matter came before the Full Court, Street C.J., with whom the other members of the court agreed, dealt first with the question of fresh evidence and decided that it ought not to be received. He then considered the matter apart from the evidence and came to the conclusion that the appeal failed, saying: "The application has to be determined on the position "as presented to the court at the time of the hearing, when "undoubtedly future prospects should be taken into account, if "there were evidence justifying a conclusion that the estate was "likely to appreciate or depreciate in the future. If there were "no evidence to that effect, then the matter must be dealt with "on the evidence as it then stands, and if on that evidence the "order would be in effect a nullity and would confer no benefit, "then I do not think the court would be justified in making an "order on the chance that it might, in some unforeseen circum- "stances, provide some benefit for the applicant."

The respondent then appealed to the High Court of Australia, who allowed her appeal on August 3, 1951. All the judges were of opinion that the respondent was entitled to succeed on the evidence before the trial judge bearing in mind that the Land Sales Control Act, 1948, no longer applied to the cottage. Dixon, Williams and Kitto JJ. also considered that the fresh evidence should have been admitted. McTiernan and Webb JJ. expressed no opinion on this point. Accordingly, the High Court allowed the appeal and awarded the respondent the whole estate. They ordered the appellant to pay the respondent's costs in the Full Court and in the High Court. From this order the appellant, by special leave granted on November 14, 1951, appealed to this Board.

Their Lordships find themselves in disagreement with the High Court of Australia on both points. Dealing first with the question of the admission of fresh evidence, the conclusion of the majority was based on their view that the principles laid

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down for the guidance of an appellate court when considering an application for leave to adduce further evidence in order to secure a retrial of a case before a jury have no application to an appeal of the present nature. Their Lordships, however, think that the principles are of general application, though the circumstances which it may be relevant to take into account may be different. Sir Frank Soskice sought to support the view of the High Court by pointing out that in *Nash* v. *Rochford Rural District Council*[35] the object of the application to call fresh evidence was to secure a new trial, and that the observations of Lord Chelmsford in *Shedden* v. *Patrick*,[36] which were cited by Scrutton L.J. in the first-mentioned case, were also directed to such applications. But their Lordships do not think that Scrutton L.J. or Lord Chelmsford would have expressed a different opinion had the object of the application been to adduce further evidence on an appeal from a judge sitting without a jury. In this connexion it is to be observed that in *Sanders* v. *Sanders*[37] Jessel M.R. said: "The appellant has applied for leave to adduce fresh "evidence, but I am of opinion that it ought not to be granted. "The application is for an indulgence. He might have adduced "the evidence in the court below. That he might have shaped "his case better in the court below is no ground for leave to "adduce fresh evidence before the Court of Appeal. As it has "often been said, nothing is more dangerous than to allow fresh "oral evidence to be introduced after a case has been discussed "in court."

That was a case of an appeal from Malins V.-C., sitting without a jury, and it supports the conclusion that the principles to which their Lordships have referred are of general application. See also *per* Cozens-Hardy M.R. in *Nash* v. *Rochford Rural District Council.*[38]

Sir Frank relied on another passage from the judgment of Jessel M.R. where he said[39]: "Moreover, speaking for myself, "I think that when an application is made for an indulgence, "the moral elements of the case ought to be taken into con- "sideration. I am more inclined to grant it when what appears "to be a substantially good and honest case is in danger of being "defeated on technical grounds."

It may well be that had the Full Court decided to admit the evidence which the respondent sought to adduce the High Court

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[35] [1917] 1 K.B. 384.

[36] (1869) L.R. 1 Sc. & D. 470, 545.

[37] (1881) 19 Ch.D. 373, 380.

[38] [1917] 1 K.B. 384, 390, 391.

[39] 19 Ch.D. 373, 381.

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would not have felt bound to reverse their decision, but the matter being one within the discretion of the Full Court, their Lordships consider that the High Court should not have interfered with the exercise of that discretion except in accordance with the well-recognized principles applicable in such cases.

Sir Frank relied on some observations of Lord Atkin and Lord Wright in *Evans* v. *Bartlam*.[40] Lord Atkin said[41]: "While the "appellate court in the exercise of its appellate power is no "doubt entirely justified in saying that normally it will not "interfere with the exercise of the judge's discretion except on "grounds of law, yet if it sees that on other grounds the decision "will result in injustice being done it has both the power and the "duty to remedy it."

Lord Wright said[42]: "It is clear that the Court of Appeal "should not interfere with the discretion of a judge acting within "his jurisdiction unless the court is clearly satisfied that he was "wrong. But the court is not entitled simply to say that if the "judge had jurisdiction and had all the facts before him, the "Court of Appeal cannot review his order unless he is shown to "have applied a wrong principle. The court must if necessary "examine anew the relevant facts and circumstances in order to "exercise a discretion by way of review which may reverse or "vary the order."

Sir Frank contended that applying the principles thus laid down injustice would be done unless the additional evidence was admitted. He argued that the order of Sugerman J. left the respondent without redress, whereas if an order in her favour had been made it could not have prejudiced the appellant if in fact the estate proved to be insolvent. He relied also on rule 5 of the Rules made in pursuance of the Act, which imposed on the appellant the duty of making an affidavit as to the nature and amount of the estate. It is plain, however, from the judgment of Street C.J. that both these points were present to the minds of the Full Court when that court reached its decision. Moreover, the evidence which it was sought to adduce was not as to a matter of fact but as to a matter of opinion, which it would have been open to the appellant to challenge, and it is impossible to say that the evidence, if admitted, would necessarily have been conclusive of the matter or at least have an important influence on the result. See as to the importance of this consideration *Rex* v. *Copestake*.[43] Looking at the matter as a whole, their Lordships do not think that the facts of this case would have justified the High Court of Australia interfering with the exercise by the Full Court of New South Wales of the discretion vested in it under section 84 of the Equity Act. Accordingly, their Lordships would not be prepared to send the case back to the Full Court of New South Wales to hear further evidence. The question, therefore, is whether on the facts as established before Sugerman J. the High Court were justified in reversing his decision, confirmed as it was by the Full Court. Those facts, stated shortly, were as follows:—

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[40] [1937] A.C. 473.
[41] Ibid. 480–1.
[42] Ibid. 486.
[43] [1927] 1 K.B. 468, 477.

(1) The only relevant asset was the equity of redemption of the house. (2) That house was valued as at the testator's death by the Valuer-General at £1,000. (3) On the basis of this valuation the equity of redemption was worth only £113. (4) The Land Sales Control Act, 1948, had ceased to apply to the house since the testator died. As a result some increase of value might be expected, but the respondent's counsel said that the interest in the cottage would not be worth much at the date of the hearing. (5) Out of the proceeds of sale of the equity there had to be discharged funeral expenses (£31), the costs of obtaining probate, the costs of the application before Sugerman J., any other testamentary expenses and the liability, if established, of the testator to the appellant. (6) Sugerman J. found the appellant's claim to be supportable at least to the extent of £200 and £300.

If that be the correct view of the facts, it seems difficult to say that the judge did not judicially exercise the discretion entrusted to him by the Act or, indeed, that the conclusion he reached that the estate was insolvent was not justified.

In the Full Court it would appear that the only points seriously argued were, first, as to the admission of the fresh evidence, and secondly, that the court ought to make an order even though the estate might be insolvent. With the first point their Lordships have already dealt. Sir Frank Soskice repeated the second submission before this Board. He argued that unless it was conclusively established that there was no net estate, the court, if satisfied that the widow had made a case on what he called the merits, must make an order. Their Lordships do not find it necessary to decide what is the proper course for a judge to adopt who is left in doubt whether the estate will ultimately prove to be solvent or not, since as they read the judge's judgment he reached a definite conclusion that the estate was hopelessly insolvent. Sir Frank did not dispute that if that conclusion was right, the judge was justified in refusing the order.

Their Lordships do not think that the High Court took a different view of the law. As their Lordships read the judgments of the judges of the High Court, they came to the conclusion that on the evidence before him Sugerman J. should have come to the conclusion that the estate was solvent and that there would be a surplus available to meet the widow's claim. They based this conclusion on two grounds. The first, and that on which they chiefly relied, was that in their opinion the house had a value considerably above £1,000 in the middle of 1950. The second was that they were not satisfied that the appellant had a valid claim against the estate. The validity of the appellant's claim against the estate depended mainly on whether her evidence was accepted. The judge who saw her treated her as a witness of truth, and their Lordships do not consider that the High Court were justified in disturbing his finding on that point.

The main issue was as to the value of the house. Dixon J. relied for his conclusion on the fact that the Land Sales Control Act, 1948, had ceased to apply to the house and the effect that in his view that event must have had on the price of houses such as the testator's. McTiernan J. took the same view. It is plain, however, that the trial judge took notice of the fact that the consequence of terminating control was that the market price of cottages rose, and the official valuation which was accepted for probate purposes would not be a true estimate of the price at which the cottage could be sold. He reached his conclusion with these considerations in mind. It may have been wrong, but it plainly did not shock the judges of the Full Court. Moreover, the circumstances to which Dixon J. and McTiernan J. refer must have been present to the minds of the legal advisers of the respondent when the matter was before Sugerman J., and they called no evidence to support the view that there was the substantial rise which the High Court assumed to be a matter of notoriety. The issue is one as to a matter of opinion, and their Lordships think that in all the circumstances the High Court were not justified in disturbing the order of Sugerman J., supported by the evidence before him and confirmed by the Full Court, because they differed from him on a matter of opinion on a subject as to which the opinions even of experts generally differ. On this branch of the case their Lordships agree with the observations of Street C.J. which they have already cited.

Their Lordships feel great sympathy with the respondent, but they agree with Street C.J. when he said: "It is impossible for "this court, within the limits which necessarily control it, to

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"achieve abstract justice in every case. It must work within "its prescribed limits, and rules must be observed and complied "with in the general interests of justice, and one general interest "is that there should be an end to litigation, once it is instituted, "and that parties should not be permitted to protract proceedings "indefinitely by taking a chance on the hearing in the lower "court as to whether the evidence is sufficient, and on finding it "insufficient should then be able to come to the appellate court "and ask for fresh evidence to be admitted, which was available "at the time and in respect of which no difficulty arose in the "way of putting that evidence before the court, and seek to have "the matter reopened on that ground."

For these reasons their Lordships will humbly advise Her Majesty to allow the appeal and restore the order of the Full Court. The respondent must pay the appellant's costs of the appeals to the High Court and to this Board.

Solicitors: *Farrer & Co.; Light & Fulton.*

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July 28;
Oct. 13.

CIVIL AIR TRANSPORT INCORPORATED . Appellants;

AND

CENTRAL AIR TRANSPORT CORPORATION . . . . Respondents.

ON APPEAL FROM THE APPEAL COURT OF HONG KONG.

International law—Aircraft—Belonging to foreign government—Sent to, and retained in, British territory—Sale by foreign government—Ownership of aircraft claimed by successor government—Sale valid—Doctrine of retroactivity inapplicable.

A contract entered into by the Nationalist Government of China, at a time when it was recognized by His Majesty's Government as the de jure government of China, for the sale to an American partnership of certain civil aircraft belonging to the Chinese Government, and which by the date of the contract had been flown by employees of the Nationalist Government to, and were then grounded in, Hong Kong, was effective to pass the property in and

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* *Present*: Viscount Simon, Lord Normand, Lord Oaksey, Lord Reid *and* Sir Lionel Leach.

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title to the aircraft to the purchasers, from whom the appellant corporation had bought them, and operated to defeat a claim to the aircraft by the succeeding Communist Government of China (of whom the respondent corporation was an organ) which, after the date of the contract, had been recognized by His Majesty's Government as the de jure government of China.

A government's policy in selling chattels which it owned was not subject to the review of foreign tribunals, and whether its action in that regard was against the interests of its people was a political question on which British courts could not pronounce.

Observations, obiter, by Denning L.J. in *Boguslawski* v. *Gdynia Ameryka Linie* [1951] 1 K.B. 162, 182, if they were to be read as authorizing a court to treat as a nullity political decisions and actions of a former government which had resulted in the transfer of property to third parties in circumstances like the present, disapproved.

Further, the subsequent recognition de jure of the Communist Government did not operate retroactively to annul the passing of the property in the aircraft and extinguish the title of the purchasers. Primarily, retroactivity of recognition operates to validate acts of a de facto government which has subsequently become the new de jure government, and not to invalidate acts of the previous de jure government. Whatever degree of physical control over the aircraft in Hong Kong was maintained by ex-employees of the Nationalist Government (who had defected from that government, though they remained in Hong Kong), that control was in defiance of an injunction granted by the Supreme Court of Hong Kong, and moreover, if those persons could be regarded as acting on behalf of the then de facto Communist Government, their action was an infringement of the Representation of Foreign Powers (Control) Ordinance, 1949, and a criminal offence in Hong Kong, and in those circumstances their action in illegally taking control of the aircraft could not give ground for the principle of retroactivity.

Dicta of Gould J. in the Appeal Court of Hong Kong on this point approved.

Judgment of the Appeal Court of Hong Kong reversed.

Appeal (No. 15 of 1952) by Civil Air Transport Incorporated, of Delaware, United States of America, against a judgment of the Appeal Court of Hong Kong (December 28, 1951) which had affirmed a judgment of the Supreme Court of Hong Kong, original jurisdiction (Howe C.J.) (May 21, 1951) dismissing the appellants' claim for a declaration that 40 aircraft with associated equipment lying on the government airfield at Kai Tak, were the property of the appellants, and holding that the ownership and right to possession of the aircraft was in the Central People's Government of China.

The aircraft, which had been flown to Hong Kong by October, 1949, by personnel in the employ of the Nationalist Government, which was then recognized by His Majesty's Government as the de jure government of China, were purchased on December 12, 1949, from that government, while so recognized, by two United States citizens, in partnership, from whom the appellants had bought them. Meanwhile, the chairman of the respondents, Central Air Transport Corporation, an organ of the Chinese Government, and the majority of that corporation's employees in Hong Kong had defected from the Nationalist Government. The question in the case was whether the fact that some weeks later —at midnight, January 5–6, 1950—His Majesty's Government recognized the previously existing Communist Government of China as being the de jure government of that country could affect the rights of the appellants under the contract of sale of December 12, 1949.

The broad proposition for the appellants was that there was no authority either of municipal or international law to support the view that succession of one government to another could affect the rights lawfully acquired from the predecessor government by persons and in relation to property outside the sovereignty of either government.

The respondents to the appeal, Central Air Transport Corporation (hereinafter called C.A.T.C.), were stated to be an organ of the Chinese People's Government.

The Appeal Court of Hong Kong (Gould and Scholes JJ.), affirming the decision of Howe C.J., agreed with his finding that the agreement of December 12, 1949, was hostile to the Central People's Government and to the interests of the Chinese people; a breach of trusteeship, and done for an alien and improper purpose, and they dismissed the appeal on that ground.

1952. July 21, 22, 23, 24 and 28. *Sir Hartley Shawcross Q.C.* and *R. I. Threlfall* for the appellants. The appeal comes before the courts under a special procedure which was established by His Majesty in Council, by the Supreme Court of Hong Kong (Jurisdiction) Order in Council, 1950, in view of the great importance of the issues involved and with the precise object of enabling the court to advise on the legal aspects of the matter. The importance of the case lies not so much in the value of the property—though the value of over £1,000,000 is not insignificant for the appellants—but in the international implications which arise from the case, now graver than when the Order in Council was made, because there was then no war in Korea. If, immediately following on the sale the question of the title to the property in these aircraft had fallen for decision before any municipal or international court it cannot, it is submitted, be doubted but that the decision would have been that the legal property in the aircraft or the right to their possession had passed to the purchasers. The question in this case is whether the fact that shortly afterwards, on January 5–6, 1950, His Majesty's Government recognized the previously existing Communist Government as then becoming, though not having been before, the de jure Government of China, could affect the proprietary rights which had already been obtained by third parties outside China, and which incidentally resulted in the aircraft being registered in the United States of America and thus acquiring the nationality of that country. The broad proposition is that there is no authority either of municipal or international law to support the view that the succession of one government to another can affect the rights otherwise lawfully acquired from the predecessor government by persons and in relation to property outside the sovereignty of either government. It was said by the great philosophers that not even the gods could undo that which had already been done, and certainly the recognition of a successor government does not involve undoing what a previous government while recognized as the de jure government had itself already done.

That can be broken down into three propositions. The first question is: is it open to the municipal courts of one country to canvass the motives or the reasons which led to the de jure government of another country doing some executive act which it was ostensibly within the power of the government to do? As to that, it is submitted that if the act in question was intra vires the State by which it was effected, then it would be wholly contrary both to municipal law and to the comity of nations for a municipal court of another country to hold that that act was contrary to the interests of the State on whose behalf it was done. The second question is: did the recognition of a previously insurgent and de facto government as the de jure government operate retrospectively so as to affect transactions involving the persons and chattels outside the territory of either government? On that matter, it is submitted that the so-called doctrine of retroactivity is merely a doctrine of convenience which, if it arises at all, has to be reconciled with the principle, itself as old as Grotius, that on a change of government the rights and obligations are transferred by succession and representation and

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not by title paramount. That is a basic rule of English law, and it is, of course, a rule which is absolutely fundamental to the continuity of the State in the family of nations. Consequently, the doctrine of retroactivity can in relation to persons and things outside the lawful territorial control of either government, only operate in relation to such rights or obligations as are possessed by the predecessor government at the moment of the transfer of its de jure status. The third question is: if there are rival claims as between a de facto government and a de jure government
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ment to State property situated in a neutral country and brought into that country by the de jure government as its own property, can the de facto government be heard to say that the fact that, contrary to the municipal law of the third country concerned and by the defection of the servants of the de jure government, it has acquired some degree of control over the property, prevents the de jure government from dealing with the title to the property? The answer to that is the old one that lawful possession remains in the person being illegally ousted from possession. The de facto government could only acquire the possession by a purported exercise of sovereign powers in British territory as against a government recognized by His Majesty as the de jure government. That is something which no de facto government can be allowed to do. Even if it were allowed to do it, the de jure government's title and right of property would not be affected.

It was said by the courts in Hong Kong that the contract of sale was entered into as a device to deprive the Communists of the assets, and the Chief Justice said that the de jure Chinese Government were not acting in good faith as trustees, but for an alien and improper purpose inimical to the interests of the people of China. If, as is the case, three-quarters of the rest of the civilized world continue to recognize the Nationalist Government as the de jure government of China, who is to say that the policy of that government in selling these aircraft was a device inimical to the interests of the people of China? It was purely a political matter. The object of the transaction, from the point of view of the Nationalist Government, was, in brief, to enable it the better to carry on its fight to regain supremacy in China. It is a fact, supported by authority, that the British Government have recognized, as de jure governments, governments which had been completely expelled from their territory. [Reference was made to Lauterpacht on International Law, pp. 60 and 93, and to Hall's International Law, 8th ed., para. 26.]

On any view of the matter, the true effect of the doctrine of retroactivity is that it applies to validate only those acts done by the newly recognized de jure government at a time when it was the de facto government and which were done within its own jurisdiction—within the sphere of its own sovereignty. Control outside the jurisdiction, with the consent of the owner of, e.g., a ship, may be allowed to give jurisdiction, but there is no authority to show that the doctrine of retroactivity applies to such a case. *The Arantzazu Mendi* [1] is the high-water mark of recognition of jurisdictional immunity in the case of de facto sovereignty; *Compania Naviera Vascongado* v. *S.S. Cristina* [2] is the high-water mark of jurisdictional immunity in the case of a de jure sovereignty. Jurisdictional immunity is, of course, in view of the express terms of the Supreme Court of Hong Kong (Jurisdiction) Order in Council, 1950, out of this case.

The question of the degree of possession or control which the Communists had, if they had any, over the aircraft in Hong Kong is not really in point in this case, and the cases dealing with possession in relation to jurisdictional immunity have no bearing on the matter at all. Possession, it is submitted, is wholly irrelevant unless the doctrine of retroactivity applies, and here it does not; and that, perhaps, is the only point in this case. Secondly, it was in any event a very subordinate and limited de facto possession, put at its highest, and the overriding control was in the governor and in the airport authorities. What is meant by control is the ability to use the thing for the purpose for which it is intended. Possession without control would not be enough for the purposes of jurisdictional immunity. Thirdly, possession is irrelevant if, as in this case, jurisdictional immunity is out of the case, and the Board here is entitled and, indeed, bound to consider questions of title. This possession was therefore wrongful, it was undoubtedly a trespass, and it was probably a breach of the court's injunction and was certainly a breach of a local statute, the Representation of Foreign Powers (Control) Ordinance, 1949.

The real point is that possession does not, and cannot, affect or decide the question of proprietary title in this case unless the doctrine of retroactivity operates in such a way that it not merely makes the de facto possession de jure, but results in revesting in the State the proprietary title of which the State had previously validly divested itself, and so operates outside the

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[1] [1939] A.C. 256.

[2] [1938] A.C. 485.

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territory of the State concerned. In other words, the question of possession is only relevant if the doctrine of retroactivity operates outside the territory of the governments themselves. The respondents would say that the doctrine of retroactivity operates to divest a title acquired by, e.g., one of Her Majesty's subjects from the government then recognized by Her Majesty simply because of the possession, ex hypothesi wrongful at the time since it was adverse to that of the recognized government, by a government not even proved to have been recognized de facto at the time and which could only be justified, if at all, by admitting the validity of an exercise of sovereign power by that de facto government outside its own territory against the de jure government in breach of the normal rules of English law in relation to property on Her Majesty's territory and over which Her Majesty or her Governor had overriding control. That is the proposition on which alone, it is submitted, the respondents can succeed. No system of law gives to a wrongdoer the benefit of his wrong. Howe C.J., in his judgment, said that "Even "though the aircraft were in Hong Kong, there is no doubt that "the Central People's Government were in possession and in "effective control"—the "effective" is challenged—"If an "analogy may be drawn between ships abroad, the masters of "which have attorned, and aircraft in similar circumstances, "then clearly here is a situation in which recognition de jure "will have a retroactive effect and, in my opinion, that retro-"active effect will go back at least as far as the dismissal of "the ministers of the Nationalist Government in October, 1949." It is submitted that there is no authority for that proposition.

The certificate from the Foreign Office given to the Appeal Court and recognizing the Central People's Government as the de facto government of those parts of China over which it had established effective control does preclude the derecognition of the old government as to acts lawfully done by it during the period it continued to be recognized over property outside the territory of either State. The doctrine of retroactivity is purely a doctrine of convenience. One must try to remedy it so as to avoid competition or a conflict between what becomes by retrospection the legitimate acts of the new government and what were by recognition the legitimate acts of the old government de jure at the time when the acts were done. The doctrine is that on recognition of a successor government Her Majesty's Government recognizes as valid acts which that government has previously done in its jurisdiction and in its territory and in

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relation to persons over whom it has control, but does not cancel the validity of the acts previously validly done by the then de jure government in relation to third parties and the subjects of third States in the territory of third States. That, it is submitted, is as far as the authorities go: *Russian Commercial and Industrial Bank* v. *Comptoir D'Escompte de Mulhouse.*[3] The critical test is the rights or obligations which the de jure government had at the date of the change. The doctrine of succession has been established for centuries, and it has to be reconciled with the doctrine of retroactivity, which is one of convenience, and the only way is to apply the limitations which have been submitted.

In *Boguslawski* v. *Gdynia Ameryka Linie*[4] it was said by Denning L.J.: "But the principle of continuity is of paramount "importance. It requires that the new government should "stand in the shoes of the old government in all respects except "in respect of acts of members of the old government which "were ultra vires, or acts which were done by them, not in good "faith as trustees for the State, but for an alien and improper "purpose." It is on that sentence that the judgments of all three judges in the courts of Hong Kong are founded in respect of the alleged alien and improper purpose contemplated by the contract under consideration in this case. That observation of Denning L.J. was obiter, and the actual decision of the Court of Appeal in *Boguslawski's* case[4] was affirmed by the House of Lords.[4*] If that case is right, that really is an end of the present case, and it is submitted that it does not matter who was in possession of these aircraft on December 12, 1949, it does not matter whether their possession was lawful, and it does not matter whether the Communist Government was in fact recognized at the time as the de facto government, because the real doctrine of retroactivity is limited to the territory of the de facto government, and can have no application outside that territory. That is the effect of *Boguslawski's* case[4] read in the light of *Guaranty Trust Company* v. *United States*,[5] where it was said: "The Government argues that recognition of the "Soviet Government, an action which for many purposes "validated here that Government's previous acts within its own "territory . . . operates to set at naught all the legal conse- "quences of the prior recognition by the United States of the

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[3] [1925] A.C. 112, 123.

[4] [1951] 1 K.B. 162, 182.

[4*] Ante, 11.

[5] (1937) 304 U.S. 126, 140.

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"Provisional Government and its representatives, as though such "recognition had never been accorded. . . . The argument thus "ignores the distinction between the effect of our recognition of "a foreign Government with respect to its acts within its own "territory prior to recognition, and the effect upon previous "transactions consummated here between its predecessors and "our own nationals. . . . But it does not follow that recognition "renders of no effect transactions with a prior recognized "Government in conformity to the declared policy of our own "Government." That is really conclusive of the question in the present case. If the *Guaranty Trust* case [5] be right, and the House of Lords have said that it is, and the Court of Appeal have adopted it completely, then it is neither here nor there that the Communists may have had control of these aircraft on December 12, 1949. [Reference was also made to Lauterpacht on Recognition in International Law, p. 291, and to *Republic of Peru* v. *Dreyfus Brothers & Co.*[6]]

There is abundant authority that on a change of government by whatever method it may take place—revolution, democratic, or cession of territory—there is a succession to the rights and obligations of the predecessor government. That is the basic proposition which has to be reconciled with the doctrine of retroactivity, and that can only be done by restricting that doctrine within narrow limits and certainly not by extending it. That is the principle, and no case carries it further than *Boguslawski's* case [7] and the *Guaranty Trust* case,[8] and if that be right those two cases conclude the matter, and it is not necessary to pass on the quality of the possession held by the Communists on December 12. If it were, it is submitted that it cannot have been a possession at all, it was a nullity, and the doctrine of retroactivity cannot apply to a case where possession is in circumstances such as existed here, tortious, in breach of injunction and in breach of statute. With regard to the propriety of the contract of sale, this is an act of State, and acts of State of our own government cannot be attacked, and still less those of a foreign government. The courts of one country will not pass upon the acts of State of another country: *United States of America* v. *Wagner*.[9]

Threlfall followed. First, in this case the Foreign Office certificate is conclusive against any retroactive effect of the change of de jure recognition except in relation to the territory controlled de facto by the Central People's Government before midnight on January 5–6, 1950. The certificate in this case is much easier to construe than that in the *Boguslawski* case,[10] because it states the facts as to the recognition de jure and de facto. If there is to be any retroactivity at all it is in terms confined by the certificate to the territory of China itself, and has no application to anything outside that territory. Secondly, as between the rival governments of a foreign State, control of property held within our jurisdiction is irrelevant to the rights which the de jure government enjoys.

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[5] 304 U.S. 126.

[6] (1888) 38 Ch.D. 348, 355.

[7] [1951] 1 K.B. 162; ante, 11.

[8] 304 U.S. 126.

[9] (1867) L.R. 2 Ch. 582, 593.

The respondents did not appear and were not represented.

July 28. It was announced at the conclusion of the hearing that their Lordships would humbly advise Her Majesty that the appeal should be allowed; that judgment should be entered for a declaration that the 40 aircraft which were the subject of the action were the property of the appellants; and that their Lordships would give their reasons later for so advising Her Majesty.

October 13. The reasons of their Lordships for allowing the appeal were delivered by VISCOUNT SIMON.

This appeal came before the Judicial Committee in most unusual circumstances. It concerns the ownership of 40 aircraft lying on the government airfield at Kai Tak in Hong Kong. An Order in Council, cited as the Supreme Court of Hong Kong (Jurisdiction) Order in Council, 1950, made by his late Majesty in Council on May 10, 1950, which came into operation forthwith, after reciting that the ownership of these aircraft (part of 70 aircraft covered by the Order) was in dispute and that it was just and desirable that the question of their ownership and of right to their possession should be decided by a court of law before they are permitted to leave Hong Kong, provided (inter alia) as follows:

"1.—(1) In any action or other proceeding concerning the "aircraft which may be instituted in the Supreme Court of Hong "Kong after the date of the coming into operation of this Order, "it shall not be a bar to jurisdiction of the court that the action "or other proceeding impleads a foreign sovereign State.

"(2) If a defendant in any such action or other proceedings "fails to appear, or to put in a defence, or to take any other step

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[10] [1951] 1 K.B. 162; ante, 11.

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" in the action or other proceeding which he ought properly to " take, the court shall, notwithstanding any rule enabling it to " give judgment in default in such a case, inquire into the matter " fully before giving judgment.

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" (3) Any person claiming ownership or right to possession of " any of the aircraft and aggrieved by the decision of the court " in an action or other proceeding . . . may appeal therefrom to " the Full Court and from thence (sic) to his Majesty in Council, " and such an appeal shall lie notwithstanding such person has " not taken any part in previous proceedings.

* * * * *

" 5.—(1) Until the Governor is satisfied that ownership or " right to possession of the aircraft have been finally determined " the aircraft shall remain in Hong Kong and the Governor may " give such directions and take such steps, whether by way of " detention of the aircraft or otherwise, as shall appear to him " necessary to prevent their removal and to ensure their maintenance and protection.

" (2) When the Governor is satisfied that ownership or right " to possession has been finally determined he may give such " directions and take such steps as shall appear to him necessary " to give effect to the decision of the court.

" (3) If any person fails to comply with any direction given " by the Governor under this section he shall be guilty of an " offence and shall be liable on summary conviction to a fine " not exceeding H.K. $5,000 or to imprisonment for a term not " exceeding six months or to both such fine and such imprisonment.

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" 6.—(2) The aircraft referred to in this Order are the aircraft " mentioned in the preamble to this Order together with any " spare parts, machinery and equipment for use in relation to " any of the aircraft, and the Governor may in case of doubt give " directions designating more particularly the aircraft, spare " parts, machinery and equipment referred to."

On May 19, 1950, the present appellants, Civil Air Transport Incorporated, a corporation formed under the laws of the State of Delaware, U.S.A., issued a writ in the Supreme Court of Hong Kong against the present respondents, Central Air Transport Corporation (hereinafter called C.A.T.C.), claiming a declaration " that the 40 aircraft now on the Government airfield at Kai

"Tak in the Colony of Hong Kong formerly the property of the "defendants together with all spare parts, machinery and equip- "ment for use in relation thereto wherever situate within the "jurisdiction of this Honourable Court are the property of the "plaintiffs and/or that the plaintiffs have the sole right to posses- "sion thereof."

C.A.T.C. are not an incorporated body, but are an organ of the Government of China. Service of the writ was attempted upon the Central People's Government of the People's Republic of China (which, for brevity, it will be convenient to call "the "Communist Government," and which may be taken as claiming these aircraft as its property), and subsequently an order was made for service by leaving a sealed copy of the writ at the office of the C.A.T.C. in Hong Kong. No appearance or notice of intention to appear was filed and, were it not for the Order in Council referred to above, the action might have proceeded no further (although the Communist Government and C.A.T.C. had notice of it), since it might be regarded as impleading a foreign sovereign State which enjoyed jurisdictional immunity. The Order in Council, however, expressly required the Hong Kong court to entertain the action, even in the absence of the defendant, "inquiring into the matter fully before giving judgment."

The action was tried before Sir Gerald Howe, then Chief Justice of Hong Kong, on March 27 and 28, 1951. On May 21, 1951, he delivered a reserved judgment dismissing the claim and, in view of the importance of reaching finality in the matter as soon as possible, directed that any appeal from his decision should be brought within two months. Notice of appeal to the Full Court was given within this time, and the appeal was heard by the Full Court (Gould and Scholes JJ.) on August 21 and 22, 1951. On December 28, 1951, the Full Court dismissed the appeal, and it is from this decision that appeal is now brought to Her Majesty in Council.

C.A.T.C. are a State-owned enterprise, operating under ministerial control, which provided air services (including communication to and from Hong Kong) by means of civil aircraft belonging to the government of China. This enterprise came into existence under the previous Nationalist Government of China and continued as an organ of that government until it passed to the Communist Government which at a certain date, in the view of His Majesty's Government in the United Kingdom, succeeded it. It is beyond dispute that the 40 aircraft which are the subject of this case originally belonged to the Nationalist Government and

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formed part of the fleet of civil aircraft operated by C.A.T.C. as an organ of that government. By September, 1949, these 40 aircraft were already lying on the Kai Tak airfield at Hong Kong, where they have remained up to the decision of this appeal. They had been flown there by the orders of the Nationalist Government. That government, under increasing pressure from Communist forces in China, had moved its headquarters in the preceding April from Nanking, its capital, to Canton; thence it moved to Chungking on October 12; thence to Chengtu on November 29; and thence to Taiwan (Formosa) on December 9, 1949. By this last date nearly the whole of the mainland of China was under the control of Communist forces acting for the rival de facto government, which on October 1 had proclaimed itself to be the government of China and had purported by decree to dismiss the ministers of the Nationalist Government and to appoint new ones.

On December 5, 1949, two citizens of the United States, Chennault and Willauer, in partnership, wrote to the Minister of Communications in the Nationalist Government at Taiwan a letter offering to purchase from that government (inter alia) the physical assets of C.A.T.C., " a major part of which are now " located in the Colony of Hong Kong." The letter also included an offer to buy the Nationalist Government's interest in a Chinese company called the Chinese National Aviation Corporation, hereafter referred to as " C.N.A.C." (the owner of the other 30 aircraft referred to in the Order in Council), but this does not affect the point now immediately in issue. The consideration for the sale, so far as assets of C.A.T.C. were concerned, was to be $1,500,000 in promissory notes, and the purchasers were to organize a corporation to which the assets would be transferred and whose promissory notes would be substituted for those of the purchasers. The terms of the letter are elaborate and had evidently already been the subject of negotiation and informal agreement between the partnership and the Nationalist Government, for the letter ends with signatures of acceptance by Liu Shao-Ting, Vice-Minister of Communications and concurrently Chairman of Board of Directors of C.A.T.C., and also by the Deputy Secretary-General of Executive Yuan and concurrently Chairman of Board of Directors of C.N.A.C. Any doubt whether these signatures amount to an acceptance by the Nationalist Government of the partnership's offer is set at rest by a letter of confirmation dated December 12, 1949, signed for the Nationalist Government by the Premier, Yen Hsi-Shan, and notifying the partnership that the sale is final and complete on the terms agreed. One of these terms was that the assets sold would not be used for transport to or from the Communist areas of China.

On December 19, 1949, the partnership of Chennault and Willauer by bill of sale transferred these assets, including these 40 aeroplanes, to the appellant company. There cannot be any doubt that if the bargain of December 12 conferred on the partnership a good title to these specific goods, that title duly passed on December 19 to the appellant company.

It is now necessary to recount certain events which occurred before the alleged sale in December. On November 9, 1949, the then President of C.A.T.C., one Mr. Chen, flew from Hong Kong to Peking and transferred his allegiance to the de facto Communist Government. About the same time the majority of the C.A.T.C.'s employees in Hong Kong also defected from the Nationalist Government, though they remained in Hong Kong. In consequence of these occurrences the Chinese Civil Aeronautics Administration (a department of the Nationalist Government) on November 13 suspended the registration certificates of all C.A.T.C.'s aircraft, the result of which would be that the authorities at Kai Tak aerodrome would not have permitted the machines with which this case is concerned to leave the ground. On the same day, one Ango Tai, an employee of C.A.T.C., who had remained loyal to the Nationalist Government, was appointed by that government to be acting President of C.A.T.C., with full power to deal with all its affairs. On November 16, Ango Tai, in exercise of this power, dismissed the defecting employees of C.A.T.C. and suspended the rest of C.A.T.C.'s Chinese staff in Hong Kong; and also appointed one Parker to be Chief of Security for C.A.T.C. at Hong Kong and to take all necessary measures permissible by law to ensure that the property of C.A.T.C. was not removed or injured by unauthorized persons. Parker was to engage special guards and to take other precautionary steps, such as roping off the areas where the 'planes were located on Kai Tak aerodrome, provided that the Hong Kong officials, namely, the Commissioner of Police and the Director of Civil Aviation, approved. Parker acted accordingly, and by next day 75 special guards were appointed with police approval and duly posted. A few days later, however, for reasons not explained at the trial, the Commissioner of Police informed Parker that the guards at Kai Tak must be withdrawn, and without Parker's consent certain of the defecting ex-employees took physical control of these assets. Thereupon Ango Tai commenced proceedings in the name of

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C.A.T.C. in the Supreme Court of Hong Kong against the principal ex-employees who had thus acted, and on November 24 the then Chief Justice, Sir Leslie Gibson, granted an interim injunction against them prohibiting this interference, restraining them from entering or remaining on the C.A.T.C.'s premises or removing or tampering with the C.A.T.C.'s property. Next day the defendants in that action obtained from Gould J. an interim injunction restraining C.A.T.C. from removing the property from the premises concerned. The injunction granted by Sir Leslie Gibson was, after some difficulty, duly served—but it was disregarded and the physical control of the aeroplanes by these ex-employees for the time being continued.

One other set of facts must be put on record, in order to complete the picture of the situation at about this date. On November 12, 1949, Mr. Chow En-loi, acting as Premier of the de facto Communist Government, issued the following document:

"To
"General Manager Chi Yi Liu,
"General Manager Cheuk Lin Chen, and
"All Officers and Workmen of
"China National Aviation Corporation and
"Central Air Transport Corporation.

"My hearty welcome to you who rise gloriously to uphold the "cause under the guidance of the two general managers Liu and "Chen.

"I hereby accept in the name of the Cabinet of the People's "Central Government of the Chinese People's Republic the tele-"graphic request made by you on 9.11.1949, declare the China "National Aviation Corporation and the Central Air Transport "Corporation to be the property of the Chinese People's Republic "and exercise (the right of) control of the said China National "Aviation Corporation and the said Central Air Transport Cor-"poration on behalf of the People's Central Government.

"I hereby appoint Chi Yi Liu to be general manager of the "China National Aviation Corporation and Cheuk Lin Chen "general manager of the Central Air Transport Corporation.

"I hope all officers and workmen of the said two corporations "remaining in Hong Kong and specially liberated areas will here-"after unite in a body under the guidance of the two general "managers Liu and Chen, heighten their precautions, shatter "the secret plots of the reactionaries, bear the responsibility of "protecting the assets and wait for further instructions (from "me). The (cost of) living for all the officers and workmen shall "be borne by the People's Central Government. I again hope "that you will stick to the position of patriots, strive to make "progress and exert yourselves in the cause of establishing the "civil aviation enterprise of New China.

"Dated the 12th day of November, 1949.

"(Sgd. & Chopped) Chow En-loi."

Cheuk Lin Chen is the Mr. Chen who had gone to Peking three days before to put himself under the de facto government.

Two months later the following instructions were issued:

"For the perusal of
"Chi Yi Liu,
"General Manager,
"China National Aviation Corporation,
"Des Voeux Road, Central, and
"Cheuk Lin Chen,
"General Manager,
"Central Air Transport Corporation,
"Queen's Road, Central.

"Hereby appoint Chi Yi Liu, general manager of China "National Aviation Corporation, to undertake the responsibility "of taking over all assets of China National Aviation Corporation "in Hong Kong (and) appoint Cheuk Lin Chen, general manager "of Central Air Transport Corporation, to undertake the responsibility of taking over all assets of the Central Air Transport "Corporation in Hong Kong. Apart from sending order by mail "(the said officers concerned) are requested to act in accordance "herewith and report as soon as possible. Chung Chik Ping, "Head of Civil Aviation Bureau of the People's Central Government of the People's Republic of China. 13th January, 1950."

It is to be observed that the earlier of these documents, which was issued before the recognition de jure of the Communist Government, does not contain directions to "take over" the assets of the C.A.T.C. in Hong Kong, but enjoins officers and men of the corporation to bear the responsibility of "protecting "the assets" and to wait for further instructions. The later document, which was issued after de jure recognition, gives the further instructions to "take over all assets of the C.A.T.C. in "Hong Kong." If, however, the contract of December 12, 1949, had the result of transferring the property in the 40 aeroplanes effectively and finally to the partnership on that date, these aeroplanes would have ceased to be assets of the C.A.T.C. thenceforward.

Before reaching a decision in the present action the Hong Kong courts required to know what government was recognized by his Majesty's Government in the United Kingdom as the government of China, whether de jure or de facto, and between what dates, and this information was, as is usual (see *The Arantzazu Mendi*[11]), obtained from the Foreign Office in London. A series of questions for this purpose had been propounded and answered before trial of the present action, and their Lordships thought it well to address an additional question to the Foreign Office during the hearing of the appeal in order to clear up any possible ambiguity that remained.

The information thus obtained (which is to be regarded as matter of which British courts take judicial notice) may be set out as follows:

(*a*) Referred to at the original hearing:

Questions.

"1. Does his Majesty's Government recognize the Republican "Government of China (the Nationalist Government) as the de "jure government of China?

"2. If not, when did his Majesty's Government cease so to "recognize that government?

"3. Is the Central People's Government or any other government recognized as the de jure government and, if so, from "what date?

"4. Has the Republican Government ceased to be the de "facto government (either at the time of moving seat of government to Formosa or otherwise) and, if so, from what date?

"5. Is any other government recognized as the de facto "government and, if so, from what date?

"6. What is the status of Formosa? Is Formosa part of "China or is it foreign territory vis-à-vis China?"

Replies to above by Foreign Office on February 11, 1950.

"1. H.M. Government in the United Kingdom does not "recognize the Nationalist Government (Republican Government) "as de jure government of the Republic of China.

"2. Up to and including midnight of January 5/January 6, "1950, H.M. Government recognized Nationalist Government as "being de jure government of the Republic of China, and as from

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[11] [1939] A.C. 256, 264.

" midnight January 5/January 6, 1950, H.M. Government ceased " to recognize former Nationalist Government as being de jure " government of the Republic of China.

" 3. As from midnight of January 5/January 6, 1950, H.M. " Government recognized the Central People's Government as " de jure government of the Republic of China.

" 4. H.M. Government recognize that the Nationalist Govern- " ment has ceased to be the de facto government of the Republic " of China. It ceased to be the de facto government of different " parts of the territories of the Republic of China as from the " dates on which it ceased to be in effective control of those parts.

" 5. H.M. Government do not recognize any government other " than the Central People's Government of the People's Republic " of China as the de facto government of the Republic of China. " Attention, however, is invited to the second sentence of the " answer to question 4.

" 6. In 1943 Formosa was part of the territories of the " Japanese Empire and H.M. Government consider that Formosa " is still de jure part of that territory. On December 1, 1943, at " Cairo, President Roosevelt, Generalissimo Chiang Kai-shek and " Prime Minister Churchill declared that all the territories that " Japan had stolen from the Chinese, including Formosa, should " be restored to the Republic of China. On July 26, 1945, at " Potsdam, the heads of the Governments of the United States " of America, the United Kingdom and the Republic of China " reaffirmed ' The terms of the Cairo Declaration shall be carried " ' out.' On October 25, 1945, as a result of an order issued on " the basis of consultation and agreement between the Allied " Powers concerned, the Japanese forces in Formosa surrendered " to Chiang Kai-shek. Thereupon, with the consent of the Allied " Powers, administration of Formosa was undertaken by the " Government of the Republic of China. At present, the actual " administration of the Island is by Wu Kou-Cheng, who has not, " so far as H.M. Government are aware, repudiated the superior " authority of the Nationalist Government.

" I am advised that the effect of recognition by H.M. Govern- " ment as stated in answer to questions 1 to 5 and in particular its " retroactive effect (if any) are questions for the court to decide " in the light of those answers and of the evidence before it."

(It will be appreciated that reply No. 6 was given before the Treaty of Peace with Japan of December, 1951, when Japan renounced any claim to Formosa.)

(*b*) Referred to on appeal to Full Court:

Further question.

"Does H.M. Government recognize the People's Government "as having become the de facto sovereign government or the "government exercising effective control on October 1, 1949, when "it was proclaimed, or any other date between that date and "January 5, 1950, of the part of China of which the Nationalist "Government had ceased to be the de facto government?"

Reply of Foreign Office on March 13, 1950.

"H.M. Government in the United Kingdom recognize that "in the period between October 1, 1949, and January 5–6, 1950, "the Central People's Government was the de facto government "of those parts of the territory of the Republic of China over "which it had established effective control, and if control was "established after October 1, 1949, as from dates when it so "established control."

(*c*) Additional question addressed by Judicial Committee to Foreign Office.

"Referring to the above reply of the Foreign Office on March "13, 1950, was there any declaration or other formal act by "H.M. Government in the United Kingdom on October 1, 1949, "or on any and what later date, recognizing the Central People's "Government as the de facto government, or is the reply to be "understood as meaning that H.M. Government in the United "Kingdom, answering on March 13, 1950, assert that their view "was as stated in this answer but that there had been no declaration or other formal act of H.M. Government on October 1, "1949, or during the period mentioned which announced or "implied de facto recognition?"

Reply of Foreign Office dated July 28, 1952.

"The only communication relevant to this question made by "his Majesty's Government to the Central People's Government "during the period October 1, 1949, to January 6, 1950, was the "following Note, which was delivered by his Majesty's Consul-"General in Peking on October 5, 1949.

"'His Majesty's Government in the United Kingdom are "'carefully studying the situation resulting from the formation "'of the Central People's Government. Friendly and mutually "'advantageous relations, both commercial and political, have "'existed between Britain and China for many generations. It "'is hoped that these will continue in the future. His Majesty's "'Government in the United Kingdom therefore suggest that,

" ' pending completion of their study of the situation, informal " ' relations should be established between his Majesty's consular " ' officers and the appropriate authorities in the territory under " ' the control of the Central People's Government for the greater " ' convenience of both governments and promotion of trade " ' between the two countries.'

" This communication was not intended at the time when it " was made either to constitute or to convey de facto recognition. " Nevertheless the answer made by the Foreign Office dated " March 13, 1950, to the questions addressed to it by the Hong " Kong courts and quoted in your letter is to be understood as " meaning that his Majesty's Government in the United Kingdom " answering on that date asserted that their view was as stated " in that answer."

Her Majesty's Government in the United Kingdom is the sovereign government of Hong Kong, and the effect of the above replies is to establish that, at any rate in the courts of Hong Kong and in the present appeal, the former Nationalist Government must be regarded as the sole de jure sovereign government of China up to midnight of January 5–6, 1950; that the present Communist Government was not the de jure government until that time; and that, while the Foreign Office, in its answer of March 13, 1950, acknowledged that from October 1, 1949, onwards the de facto government of those parts of China in which the Nationalist Government had ceased to be in effective control was the Communist Government, H.M. Government had not announced or communicated their recognition of the Communist Government as the de facto government over any part of China before they recognized the Communist Government as the de jure government of China on January 5–6, 1950.

The argument of the appellants before the trial judge was conveniently summarized by Sir Gerald Howe C.J., as follows: (*a*) The C.A.T.C. was wholly owned and controlled by the Nationalist Government and there was a valid sale on December 12, 1949, by that government to the partnership, a condition being that the partnership should organize a corporation to which the physical assets were to be transferred; (*b*) the partnership duly transferred the assets by a sale valid in American law to the appellants; (*c*) a change of government is by succession and not by title paramount, and accordingly the Nationalist Government was empowered to enter into this transaction, being still recognized as the de jure government by H.M. Government, and the doctrine of retroactivity did not apply.

The trial judge rejected this argument on two main grounds, which call for the most careful examination. The first ground (which was also adopted by both the judges of the Full Court) is that the situation of the Nationalist Government on December 12, 1949, was such that it could not validly enter into such a sale, and that the terms of the purported sale were not such as the government could lawfully impose. In order fully to appreciate the judge's view on this point, it is necessary to quote two passages from his judgment:

" The position on December 12, 1949, when this contract was " made, was that the Nationalist Government no longer exercised " any effective control over the mainland of China; that govern- " ment was established outside Chinese territory; the aircraft " were in Hong Kong and the members of the staff and employees " had attorned to the Central People's Government. Subsequently " the courts of Hong Kong held, and, with respect, in my opinion " rightly held, that these aircraft were and had been in the posses- " sion and control of the Central People's Government. I will " refer here to certain extracts from the document of sale:—

" ' (D) The government is unwilling to sell or otherwise dis- " ' pose of said physical assets or stock except upon the most " ' binding assurances that after such sale or disposition they will " ' not be used in any way for the benefit of or for the carriage " ' of passengers or goods within, to or from the Communist areas " ' of China; and

" ' (6) Chennault and Willauer agree that the said assets shall " ' not be used, directly or indirectly, for the benefit of or for the " ' carriage of passengers or goods within, to or from the Com- " ' munist areas of China.'

" By normal diplomatic usage, and indeed to be inferred from " the terms of the contract quoted above, the then Nationalist " Government must have been fully alive to the probability of " the withdrawal of recognition by his Majesty's Government in " the near future, and in fact this took place as from midnight " January 5–6, 1950, and it is evident that this transaction was " a device entered into with full knowledge by both parties, by " which it was hoped that the aircraft might be prevented from " passing to the Central People's Government on its recognition " de jure, for the references to ' Communist Areas of China ' must " relate to the areas controlled by that government, recognized as " the de facto government of those areas.

" It is a transaction inimical to the Central People's Govern- " ment and indeed, as the aircraft were used for a public purpose "within and without China, inimical to the interests of the "Chinese people."

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"In the transaction now before this court, I have no hesitation "in reaching the conclusion that not only was it one designed to "embarrass the Central People's Government, but it was against "the interests of the Chinese people and that it was a transaction "incompatible with that trusteeship which every government "must assume. The loss of these aircraft in a country so large "as China and with poor communications would be severe. The "majority of the staff and employees had already attorned to the "Central People's Government, and the aircraft were only at any "time owned by the Nationalist Government solely in its capacity "of trustee. I cannot hold that at the time of the transaction "the Nationalist Government may properly be said to have sold "these aircraft for the purposes of fighting to regain its former "territory. In my opinion, this was an act of members of the "Nationalist Government done not in good faith as trustees but "for an alien and improper purpose."

With great respect to the former Chief Justice, their Lordships are unable to accept this view of the facts and the inferences drawn from them as leading to the conclusions stated, or to regard them as justifying a denial of the appellants' title.

For the purpose of judging the correctness of this first ground (the second ground will be considered later) the validity of the transaction must be judged as at the date when it was entered into, and not in the light of subsequent events, which might have turned out differently. On December 12, 1949, the Nationalist Government was the de jure government of China, of which C.A.T.C. was an organ, and therefore the property in these aeroplanes was in the Nationalist Government. The machines had been moved to Hong Kong two months before, and it was open to their owners to sell them, and thereby to pass the property in them to the purchasers. No doubt the motive for making the actual sale was to secure that, if they were flown to an area where the Communists were able to capture them, they should not be added to Communist resources, and the conditions of the contract make this abundantly clear. The Nationalist Government was in retreat and was by this time all but driven out of China, but it was still resisting its opponents, and in their Lordships' view the impeached sale was no more "a device" adopted for an "alien "and improper purpose" than would have been the blowing up of a store of ammunition in an arsenal in China from which

Nationalist forces were on the point of being driven out. Whether the Nationalist Government on December 12, 1950, were "alive "to the probability of the withdrawal of recognition by H.M. "Government in the near future" is at best a matter of speculation; other foreign governments did not take this course, and there is no evidence of any warning by H.M. Government in the United Kingdom that they were themselves likely shortly so to act. The reference to "normal diplomatic usage" presumably points to the undoubted fact that by international law an established and recognized government may be so completely overthrown by insurgent forces which claim to supplant it that the recognition hitherto afforded to it by foreign countries may properly be withdrawn—but when and by whom only the future can show.

A government's policy in buying or selling chattels which it owns is not subject to the review of foreign tribunals, and whether its action in this regard is against the interests of those it is supposed to serve is a political question. British courts cannot take it on themselves to pronounce whether a foreign government, recognized by H.M. Government, is acting contrary to the interests of its people, and a government is certainly not a trustee in these matters in any legal sense. The right in municipal law to follow property which is subject to a trust into the hands of third parties cannot have any application here.

It appears to their Lordships that the view under this head adopted by the trial judge, and by the Full Court, really is that on December 12, 1949, the Nationalist Government knew that it was on the point of being succeeded by a Communist Government, which would be recognized as the de jure government of China, and that, without any regard to public interests or to any injury it was doing to the Chinese people, it got rid of these aeroplanes out of spite, merely to embarrass its inevitable successor. Such a view involves assumptions which their Lordships are not prepared to make. The trial judge claimed to found himself on a sentence in the judgment of Denning L.J. in *Boguslawski* v. *Gdynia Ameryka Linie*.[12] That sentence was not necessary to the actual decision, and it was the decision which was confirmed by the House of Lords. The sentence occurs in a passage where the Lord Justice was emphasizing the paramount importance of the principle of continuity, i.e., of a succeeding government accepting what has been done by its predecessor, and if the qualification introduced by the Lord Justice were to be read as authorizing a court to treat as a nullity political decisions and actions of a former government which have resulted in the transfer of property to third parties in circumstances like the present, their Lordships would respectfuly disagree. At the same time, their Lordships must not be understood to reject the possibility of our courts refusing, in a conceivable case, to recognize the validity of the disposal of State property by a government on the eve of its fall, e.g., by a despot, who knows that previous recognition is just being withdrawn, where it is clear that his purpose was to abscond with the proceeds, or to make away with State assets for some private purpose.

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[12] [1951] 1 K.B. 162, 182.

The second ground on which the decision appealed against was based in the Hong Kong courts (Gould J. dissenting) depends on the alleged retroactive effect of the recognition by H.M. Government in the United Kingdom of the Communist Government as the de jure government of China as from January 5–6, 1950. This argument assumes that up to December 12, 1949, the aeroplanes were the disposable property of the Nationalist Government and that it validly transferred them as specific and ascertained goods by the contract of that date to the appellants' predecessors in title. On this assumption, the appeal can fail only if the subsequent recognition de jure of the Communist Government annulled the passing of the property.

Subsequent recognition de jure of a new government as the result of successful insurrection can in certain cases annul a sale of goods by a previous government. If the previous government sells goods which belong to it but are situated in territory effectively occupied at the time by insurgent forces acting on behalf of what is already a de facto new government, the sale may be valid if the insurgents are afterwards defeated and possession of the goods is regained by the old government. But if the old government never regains the goods and the de facto new government becomes recognized by H.M. Government as the de jure government, purchasers from the old government will not be held in her Majesty's courts to have a good title after that recognition.

Primarily, at any rate, retroactivity of recognition operates to validate acts of a de facto government which has subsequently become the new de jure government, and not to invalidate acts of the previous de jure government. It is not necessary to discuss ultimate results in the hypothetical case when before the change in recognition both governments purport to deal with the same goods. The crucial question under this branch of the analysis in the present appeal is whether anything that happened in Hong Kong to these aeroplanes at the instigation of or on behalf of the de facto Communist Government before the change of recognition on January 5–6, 1950, is retrospectively validated, so that the title conferred by the contract of December 12, 1949, is extinguished.

It might be too wide a proposition to say that the retroactive effect of de jure recognition must in all cases be limited to acts done in territory of the government so recognized, for the case of a ship of the former government taken possession of by insurgents on the high seas and brought into a port which is under the control of the de facto government would have to be considered (see *Banco de Bilbao* v. *Sancha* [13]). But the actual question now to be answered concerns chattels in the British colony of Hong Kong which at the time of the sale belonged to the Nationalist Government. Whatever the degree of physical control over these chattels maintained by the defecting ex-employees, this control was in defiance of the injunction granted by the Supreme Court of Hong Kong on November 24. Moreover, if these persons could be regarded as acting on behalf of the de facto Communist Government, their action would be a direct infringement of the Representation of Foreign Powers (Control) Ordinance of November 4, 1949, and would be a criminal offence by the law of Hong Kong. This Ordinance provided that no person should "function "on behalf of any foreign Power" without the consent of the governor, and "foreign Power" was defined to include "the "government whether legal or de facto of any foreign State." The governor gave no consent. In such circumstances the action of those who illegally took control of these aeroplanes cannot give ground for the principle of retroactivity.

Gould J. pointed out that Lord Wright's proposition in *Compania Naviera Vascongado* v. *S.S. Cristina* [14] that it did not matter by what mode possession was obtained "was in relation "to a claim of sovereign immunity arising from the independent "status in international law of the foreign sovereign. In the "present case no such question can be considered, and the court "must make a declaration of legal rights. If those rights are "dependent to any extent on possession of the subject-matter of "the dispute, I think that acquisition of possession by a wrongful "act cannot confer upon the party so acquiring it any benefit

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[13] [1938] 2 K.B. 176.

[14] [1938] A.C. 485, 506.

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" which he did not previously enjoy. In other words, the question " must be settled with reference to the right to possession.

* * * * *

" My opinion therefore upon this aspect of the case is that the " Central People's Government could not show any superior title " or right to possession; nor can it rely upon any rights arising " out of actual possession acquired in the way it was; therefore " it had no possession which could bring into effect the doctrine " of retroactivity. That doctrine, I think, relates to the acts of " a government which has already acquired jurisdiction through " possession and cannot include the actual act of taking posses" sion if that act be wrongful. On this point I hold therefore " that the ordinary principle of continuity was not displaced by " any consideration of retroactivity and that it follows that the " Nationalist Government was entitled to possession of and had " jurisdiction over the aeroplanes."

Their Lordships agree with the argument and conclusions of Gould J. on this point.

The trial judge attached importance to the announcement of October 1, 1949, the authors of which proclaimed themselves to be the government of China, and to the decree issued on that date purporting in the name of that government to dismiss the ministers of the Nationalist Government. Their Lordships cannot accept the view that this is any reason for saying " that as " from October 1, 1949, these aircraft were owned by the Central " People's Government." They adopt on this point the opinion of Gould J., who observed: " The purported dismissal on October 1, " 1949, of the ministers of the Nationalist Government . . . can " only be deemed effective within the territory and as regards " assets from time to time in the control of the People's Govern" ment. Elsewhere, and so long as the Nationalist Government " retained de jure recognition, such a decree could have no effect."

For the above reasons, their Lordships have reached the conclusion that the appeal should be allowed. They have already humbly advised her Majesty, as announced on July 28 last, to this effect, and the Order in Council allowing the appeal was made next day. No order is made as to costs.

Solicitors: *Markby, Stewart & Wadesons.*

[HOUSE OF LORDS.]

H. L. (E.)* BARRON (INSPECTOR OF TAXES) . . . APPELLANT;

AND

LITTMAN . . . . RESPONDENT.

1952
June 10, 11, 12, 16, 17;
July 31.

Revenue—Income tax—Assessments on "excess rents" in case of "short leases"—Loss on other properties held on short leases and only in some cases re-let—Claim to deduction or set-off—"Transaction"—"Profits"—"Excess"—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Case VI—Finance Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 10), *s.* 27 (1)—*Finance Act,* 1940 (3 *&* 4 *Geo.* 6, *c.* 29), *s.* 15 (1).

A taxpayer, who owned twenty-eight leasehold properties, sublet twenty-three of them at rents exceeding those which he himself paid and also exceeding the amounts of their respective assessments under Sch. A to the Income Tax Act, 1918; two he sublet at rents lower than those paid by him to the head lessors; three he had failed to let, though he had tried to do so. The leases were all "short leases" within the meaning of section 13 of the Finance Act, 1940, and leases to which section 15 of the Act applied. He was assessed to income tax under Sch. A on the annual value of the properties and also, as regarded the twenty-three properties, in respect of the "excess rents" derived from them, under Case VI of Sch. D in pursuance of section 15 of the Act of 1940:—

Held, that by virtue of section 27 (1) of the Finance Act, 1927, the taxpayer was entitled to a deduction in respect of losses which he had sustained in respect of the other five properties since there was in each case "a transaction of such a nature "that if any profits had arisen therefrom [the taxpayer] would "have been liable to be assessed in respect thereof under Case VI "of Sch. D" within the meaning of the subsection. The "profits" therein referred to were "profits or gains" in an income tax sense and the tax on "excess rents" under Case VI of Sch. D was a tax in respect of profits or gains.

Decision of the Court of Appeal (sub nom. *Littman* v. *Barron* (*Inspector of Taxes*)) [1951] Ch. 993 affirmed.

APPEAL from the Court of Appeal (Cohen and Singleton L.JJ., Jenkins L.J. dissenting).

The taxpayer, who was a dealer in property, made a practice of acquiring leasehold properties with a view to subletting them at a profit. In the year ended April 5, 1943, he had 28 such properties. Of these, 23 had been sublet by him each at a rent in excess of the sum at which it had been assessed under Sch. A and of the rent which he himself paid, which was less than the Sch. A assessment. The leases were all " short leases " within section 13 (1) of the Finance Act, 1940, and leases to which section 15 of the Act applied. Thus, for example, the taxpayer held No. 22 Oxford Street on a short lease, reletting it at a net rent of £3,500. The Sch. A assessment was £2,100. Consequently the " excess " in respect of which he was liable to be charged to tax was £1,400. Similar calculations in the case of the other properties sublet at a profit produced a total figure of " excess " of £4,830. Of the remaining five properties, he failed to let three, and two he only succeeded in reletting at substantially lower rents than those payable by him. For example, he took a short lease of No. 220 Edgware Road at a rent of £550, which exceeded the net annual value of the property for the purposes of Sch. A, but was only able to let it at £100; his loss was accordingly £450. The total losses on the five properties were £3,575.

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* *Present:* VISCOUNT SIMON, LORD NORMAND, LORD OAKSEY, LORD REID and LORD ASQUITH OF BISHOPSTONE.

The taxpayer was assessed to tax for the year in question under Case VI of Sch. D by virtue of section 15 of the Finance Act, 1940, in respect of the " excess rents." (The original assessment was for the estimated sum of £5,000, but the Special Commissioners corrected it to the sum of £4,830.) The taxpayer did not dispute that at £4,830 the " excess " in respect of which he was chargeable to tax under Case VI of Sch. D had been correctly calculated in accordance with section 15 of the Act of 1940, but claimed to deduct from or set off against this total the £3,575 losses.

The Special Commissioners decided in favour of the Crown. On a case stated by them pursuant to section 149 of the Income Tax Act, 1918, Wynn-Parry J. affirmed their decision. The Court of Appeal allowed with costs an appeal by the taxpayer. The Crown appealed to the House of Lords, leave being given on an undertaking by counsel for the appellant not to seek to disturb the order of the Court of Appeal as to costs.

Assessments on the same principle were made for the years 1940–1 and 1941–2. These also were under appeal.

Sir Frank Soskice Q.C. and *Sir Reginald Hills* for the Crown. The three assessments were rightly made. The question is whether the taxpayer can set off against the notional " excess " in respect of which he has been taxed under section 15 of the Finance Act, 1940, the commercial loss which he has sustained in respect of the other five properties. The issue depends on the nature of the "excess" rent and is governed by section 27 of the Finance Act, 1927.

The formula for arriving at the tax payable under section 15 is as follows: Ask whether the taxpayer holds under a short lease. If so, what rent does he pay? (say £150). Compare this with the Sch. A assessment (say £100) and see which is the higher. Then look to see what rent the taxpayer gets by subletting (say £400). The "excess" rent will there be £250.

The income tax legislation of 1842 provided for an annual revaluation of property for the purposes of Sch. A. But the practice arose for each annual Finance Act to provide that the valuation of the previous year should remain the value for that year, save that every sixth year that provision was omitted. Section 27 of the Finance Act, 1930, in terms provided for a quinquennial valuation. This remained in operation until section 25 of the Finance Act, 1940, suspended quinquennial valuations, which thereafter remained suspended. Partly as a result of *Fry* v. *Salisbury House Estate Ld.*[1] and partly because of this suspension of the quinquennial valuations during the war, section 15 of the Act of 1940 was passed; in effect it provides for a notional Sch. A revaluation.

The "excess" produced by making the computation prescribed by section 15 of the Act of 1940 does not correspond to a commercial profit, for it is possible to make a loss in a commercial sense and yet be taxed on that "excess," and vice versa there may in other cases be a commercial profit but no "excess"; it is only if the rent received and the rent paid both exceed the Sch. A assessment that the "excess" can correspond to the commercial profit. Accordingly the "excess" cannot be diminished by setting off against it a commercial loss such as that envisaged by section 27 of the Act of 1927, where "profit" (which is contrasted with "loss") means commercial profit, such profits as could not have been assessed, by virtue of section 15 of the Act of 1940, under Case VI of Sch. D, since section 15 does not charge profits within the meaning of that section. Since "set off" involves subtraction, it can only exist where the thing subtracted and that from which it is subtracted are homogeneous. You cannot subtract peas from beans. The expression "profits or gains" in section 27 (1) is contrasted with the expression "profits" alone earlier in the section, where it means a commercial profit. To attribute to the word " profits " there the meaning of assessable or taxable profits would involve a tautology in the section.

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[1] [1930] A.C. 432.

In section 27 (1) the word " any " in the phrase " any profits " is equivalent to " all," so that it requires that all profits should be assessable under Case VI of Sch. D. But as the properties in question are assessed under Sch. A, it cannot be claimed that all the profits arising from the transactions in question are liable to be assessed under Case VI of Sch. D. The wording is " if " *any profits* had arisen therefrom, he *would* have been liable to " be assessed *in respect thereof* under Case VI," and section 15 of the Act of 1940 cannot satisfy these requirements, since it is not concerned with profits but with " excess " rents, and though, if profits arise, there may be an assessment under Case VI, it will not be " in respect thereof," which expression must cover the whole ground of " any profits," anything which one can regard as a profit springing from the transaction. Section 27 cannot apply to a case where if " profits " (whatever that may mean in the section) had arisen they might or might not have been assessable under Case VI. Accordingly the loss was not sustained in a transaction of the character required by section 27, for the " excess " could not arise from the transaction but from the operation of section 15 of the Act of 1940. The transaction (if there was a transaction) was a mere sine qua non. But, in any event, there was not here a transaction at all. No transaction in any material sense is shown to have taken place as regards any of the five properties in respect of which losses are alleged to have occurred. As to the meaning of " transaction," see *Ryall* v. *Hoare* [2]; *Cooper* v. *Stubbs* [3]; *Lyons* v. *Cowcher*,[4] and *Sherwin* v. *Barnes*.[5]

Section 16 of the Act of 1940 has little bearing on the point now in question. Section 17 is dealing with a different aspect of the subject and carries the matter no further, nor does section 18.

As to reliefs, see also Income Tax Act, 1918, s. 34, rule 13 of the Rules applicable to Cases I and II of Sch. D; Finance Act, 1928, s. 33; Finance Act, 1933, s. 32 (6); Finance Act, 1940, s. 24 (6).

Sir Reginald Hills following. When looking at section 27 of the Act of 1927 in its entirety and in its context it is clear that the word " profits " is used in its well-known sense of commercial profits. There is a clear distinction between business profits and notional profits under Cases I and II. The wording of the section was formed to deal with such transactions as those dealt with in *Ryall* v. *Hoare*[6] and *Lyons* v. *Cowcher*.[7] It did not bear any relation to a Sch. A profit because no Sch. A profit would be taxed under Case VI. "Loss" in the section means a commercial loss and that throws light on what is meant by "profits" from a transaction. It must be such a transaction that, had there been profits, they would have been Case VI profits. Case VI necessarily taxes profits and gains. Admittedly the expression "profits" is often used as a generic term to include all the subject-matter of taxation, any kind of taxable income, but it is often used otherwise in its narrower sense of commercial profits. In income tax legislation there is some confusion in the use of the word "profits": see *Ystradyfodwg and Pontypridd Main Sewerage Board* v. *Bensted*.[8] [He also referred to Income Tax Act, 1918, s. 34; Valuation of Property (Metropolis) Act, 1869, ss. 45 and 75, and *T. Beynon & Co. Ld.* v. *Ogg*.[9]]

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[2] [1923] 2 K.B. 447, 453–4, 454–5.
[3] [1925] 2 K.B. 753.
[4] (1926) 10 Tax Cas. 438.
[5] (1931) 16 Tax Cas. 278.

Further, "any profits" in section 27 cannot mean "some "part of the profits," and since the properties are assessed under Sch. A all the profits are not assessable under Case VI. Assuming this to be a transaction, it is one which produces tax under two different heads. In any event, no transaction can be indicated out of which any profits could have arisen.

Tucker Q.C. and *Mustoe Q.C.* for the respondent. Section 15 of the Act of 1940 represented a considerable alteration in the law, because until then a person who had let property at a rent (whether he was the freeholder or an intermediate lessor) would only have to bear tax himself to the extent of the maximum of the Sch. A value. If (as happened in some cases) the rent he received was greater than the Sch. A value, the surplus was not taxable in his hands. That easily happened when there had been no revaluation of the property for some time. Section 15 effectively dealt with that matter and enacted that in such a case the excess rent was to be taxed not under Sch. A but under Case VI of Sch. D. It is incredible that in considering this alteration in the law the Revenue authorities should have had no idea of the possibilities of section 27 of the Act of 1927, one of the enactments providing that a taxpayer should not be taxed solely on his profits.

In the Income Tax Act, 1842, there was no provision for

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[6] [1923] 2 K.B. 447.

[7] 10 Tax Cas. 438.

[8] [1907] A.C. 264, 267.

[9] (1918) 7 Tax Cas. 125, 132–3.

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giving the taxpayer relief in respect of losses to him save that provision in section 100 which corresponds to rule 3 of Cases I and II of Sch. D to the Income Tax Act, 1918. So far as property was concerned, relief was granted by a provision in section 60 of the Act of 1842 which corresponds with rule 4 of No. VIII of Sch. A to the Act of 1918. As the rate of tax grew so did the clamour for relief. Enactments dealing with relief are Customs and Inland Revenue Act, 1890, s. 23 (which corresponds to section 34 of the Act of 1918); section 33 of the Finance Act, 1926; section 13 of the Finance Act, 1937; section 27 of the Finance Act, 1927, and section 19 of the Finance Act, 1928. The consideration of these enactments indicates that there is nothing strange in the respondent's case or in assuming that the draftsman of the Finance Act, 1940, had in mind section 27 of the Act of 1927.

What must be shown here is that the taxpayer sustained loss in respect of the last five transactions listed, these being transactions " of such a nature that, if any profits had arisen therefrom, " he would have been liable to be assessed in respect thereof " under Case VI of Sch. D." The first question is: What is meant by the word " profits "? The second is: What is meant by the words " assessed in respect thereof "?

Taking the second question first and assuming provisionally that the word profits bears the meaning attributed to it by the Crown, the meaning of " assessed in respect thereof " is " brought " into computation or coming under scrutiny to see whether a " liability to tax exists ": see *Kensington Income Tax Commissioners* v. *Aramayo*,[10] which shows that the word " assess " is used generally to indicate the preliminary assessment. Thus " charged in respect thereof under Case VI " indicates applying the Case VI measure and the phrase must mean " charged in " respect of those profits under Case VI to whatever amount of " tax the Rules applicable to Case VI provide." On that footing it does not matter whether the profits are commercial profits or any other sort of profits.

However, on the first question, having regard to the context of section 27, " profits " must mean or include assessable profits computed for the purposes of Case VI of Sch. D, because one cannot tell from the differences in the rents what is the actual profit. It is not true that if one takes a lease of property at a rent of £100 and sublets at £200 one has made a profit of £100.

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[10] [1916] 1 A.C. 215, 225–6.

It depends on the terms of the leases and the obligations to repair imposed on the tenant. Repairs might entirely wipe out the profits. Further, if letting property is the taxpayer's business, office expenses must also be taken into account. The Crown is trying to establish a proposition in which one of the factors is unknown. The taxpayer's contention is not invalidated even if "loss" in section 27 means a commercial loss. By virtue of the Income Tax Act, 1918, s. 1, and charging rules 1 (*b*) and 2 (Case VI) of Sch. D, all sums assessable to tax under Case VI are "profits or gains" for the purposes of the Act and of the Finance Acts, including that of 1927.

The taxpayer is entitled to succeed for two reasons. (1) If actual profits had arisen as described in section 27 (1), he would have been assessed or charged in respect of those profits (not on them) under Case VI, and the result might have been that he paid no tax because of the method of measurement. (2) If profits had arisen from the transaction he would have been liable to be assessed solely under Case VI because that profit would have consisted of part of the rent received and no part of the rent received could have been assessed under Sch. A, but only under Case VI. The phrase "assessed in respect thereof" does not mean "charged to tax on the whole sum." In the Finance Acts "profits" when used by itself (as in section 27 (1)) means profits in the income tax sense and not actual profits: see section 14 (4) of the Act of 1918. There is here no contrast between "profits" on the one hand and "profits and gains" on the other.

All that section 27 (1) requires is that one should have had a transaction, that one should have sustained a loss, that if there had been profits they should have been liable to be scrutinized under Case VI, though on consideration the tax payable might turn out to be nil.

[They referred to the Finance Act, 1920, s. 17 (1); the Finance Act, 1927, ss. 39 (3), 40 and 47; the Finance Act, 1935, s. 19, and *Fry* v. *Salisbury House Estate Ld.*[11]]

Mustoe Q.C. following. The Crown contends that section 27 gives relief in a very restricted sense. But prima facie it seems to be drawn in very wide terms. It appears as if the draftsman intended the relief to be given over a very wide range of taxable income provided it all came within the scope of Case VI. That would be consistent with the conditions existing when it was passed. Several cases had been decided under Case VI: *Cooper*

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[11] [1930] A.C. 432, 450.

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v. *Stubbs*[12]; *Lyons* v. *Cowcher*[13]; *Sherwin* v. *Barnes*,[14] and *Ryall* v. *Hoare*.[15] Coming first to section 27 and looking at its wording one would come to the conclusion that it was a relieving section on a wide scale, and this would be reinforced by considering the kinds of cases the draftsman had in mind at the time of drafting. Section 17 of the Finance Act, 1940, dealing with the comparable case of long leases, gives the kind of relief the taxpayer is now claiming. Section 15 of the Act of 1940 and section 27 of the Act of 1927 are directed to achieving the same result in relation to short leases but by different methods. It is meaningless to say that section 15 does not tax a profit but only an "excess," because it provides that the excess is to be taxed and it is treated as being the profit. [He also referred to *Rossdale* v. *Fryer*[16]; *Moore* v. *Drughorn*,[17] and *Drughorn* v. *Moore*.[18]]

Sir Frank Soskice Q.C. in reply. No doubt the introduction of section 27 of the Act of 1927 was due to such cases as *Ryall* v. *Hoare*[19]; *Lyons* v. *Cowcher*,[20] and *Cooper* v. *Stubbs*,[21] and was designed to deal with such transactions. The real question is whether, by accident or design, section 15 of the Act of 1940 brought new subject-matter within section 27, and that depends on its construction. Section 27 is not complied with unless, looking at all the profit arising from the transaction, one can say that the taxpayer is liable to be assessed in respect of all of it under Case VI. The section contemplates profits as to which one can ask: Are they all taxable under Case VI? If not, then the section does not apply. "Profits" arising from the transaction are actual profits and nothing else, and the words cannot be applied to a notional profit. If the section had said "if a "profit had arisen," the taxpayer would be in a stronger position. As to the word "profits," one finds scattered all over the income tax code the expression "profits or gains," and one has to examine the context in which it occurs: see *R.* v. *Special Commissioners of Income Tax; Ex parte Essex Hall*[22] and *Tennant* v. *Smith*.[23]

Their Lordships took time for consideration.

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[12] [1925] 2 K.B. 753.
[13] 10 Tax Cas. 438.
[14] 16 Tax Cas. 278.
[15] [1923] 2 K.B. 447.
[16] [1922] 2 K.B. 303.
[17] [1922] 2 K.B. 492.
[18] [1924] A.C. 53.
[19] [1923] 2 K.B. 447.
[20] 10 Tax Cas. 438.
[21] [1925] 2 K.B. 753.
[22] [1911] 2 K.B. 434, 441.
[23] [1892] A.C. 150, 163–4.

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July 31. VISCOUNT SIMON. My Lords, the question in this appeal arises on a case stated by the Special Commissioners pursuant to section 149 of the Income Tax Act, 1918. The Special Commissioners' decision was in favour of the Crown and this decision was confirmed by Wynn-Parry J. In the Court of Appeal there was a difference of opinion, Cohen and Singleton L.JJ. being in favour of the present respondent, while Jenkins L.J. would have upheld the decision of the court below. The taxpayer's appeal was, therefore, allowed, but, on the present appellant undertaking by his counsel not to seek to disturb the order of the Court of Appeal as to costs, he was given liberty to lodge a petition of appeal to the House of Lords, and this appeal is the result.

The matter under discussion concerns certain assessments to income tax for the years 1940–41, 1941–42 and 1942–43. It is only necessary to consider and decide the issue in the third and last of these years, since it is agreed that this decision will equally govern the two previous years.

The controversy that has arisen between the Crown and the taxpayer involves the consideration of section 15 of the Finance Act, 1940, under which the respondent, who is a dealer in property, has been charged to tax under Case VI of Sch. D in respect of excess rents in 23 cases where he has succeeded in reletting property so as to attract tax under that section, and raises the question whether, under section 27 of the Finance Act, 1927, he may set off against the amounts so assessed losses which he has incurred in five other cases where he acquired properties on lease for the purpose of reletting, but only succeeded in reletting them at a substantially lower rent or failed to relet them at all.

In the well-known case of *Fry* v. *Salisbury House Estate Ld.*[24] it was decided that the holder of property assessed under Sch. A, who received rents from letting the property which gave him a profit over and above the Sch. A annual value, was not liable to tax under Sch. D in respect of that extra profit inasmuch as the annual income derived from the ownership of lands, tenements and hereditaments could only be assessed under Sch. A and in accordance with the rules of that Schedule. While the Revenue has an option to choose under which Case of Sch. D they will claim tax, they have no option as between Schedules, and the annual value to the taxpayer of property assessed under Sch. A did not, as the law then stood, expose the holder to additional tax under another Schedule on the ground that he was receiving more profit from the properties than was represented by Sch. A values. At the time of the decision in *Fry* v. *Salisbury House Estate Ld.*[24] the annual value of London properties was fixed under the Valuation of Property (Metropolis) Act, 1869, while the annual value of properties elsewhere was measured by rule 1 of the Rules applicable to Sch. A, and was the annual rent if the hereditament had been let at a rack-rent within seven years of the assessment, or, if not, the rack-rent which they were actually worth subject to the statutory allowances. This difference of treatment was got rid of by section 31 of the Finance Act, 1930, which in effect made the rules for ascertaining annual value under Sch. A in the rest of England applicable also in London. Sch. A was, however, itself preserved as the Schedule under which all income from the ownership of land continued to be taxed.

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[24] [1930] A.C. 432.

Partly for the reason that *Fry* v. *Salisbury House Estate Ld.*[24] left the profit which the Revenue sought to tax in that case untaxed, and partly because a quinquennial valuation of properties was due to be carried out at a time when the country was involved in war and those concerned in such a valuation would be otherwise occupied, Parliament enacted section 15 of the Finance Act, 1940. That section is as follows: "(1) If, as respects any year of assessment, the immediate lessor of a unit of assessment is entitled in respect of the unit to any rent payable under a lease or leases to which this section applies, he shall be chargeable to tax under Case VI of Sch. D in respect of the excess, if any, of the amount which would have been the amount of the assessment of the unit for the purposes of Sch. A, as reduced for the purpose of collection, if the annual value of the unit had been determined (in accordance, in whatever part of the United Kingdom the unit is situated, with the Rules applicable to Sch. A set out in Sch. I to the Income Tax Act, 1918), by reference to that rent and the other terms of the lease or leases, over whichever is the greater of—(*a*) the actual amount of the assessment of the unit for the purposes of Sch. A, as reduced for the purpose of collection; or (*b*) the amount of any rent payable by the immediate lessor in respect of the unit under any short lease or short leases. (2) Where the immediate lessor of any unit of assessment is occupying any part thereof, subsection (1) of this section shall apply as if the rent to which he is entitled in respect of the unit under any lease or leases to which this

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[24] [1930] A.C. 432.

"section applies were increased by so much of the annual value "of the unit (as ascertained for the purposes of Sch. A) as is "attributable to the part which he is occupying. (3) Where for "any year an assessment has been made on an immediate lessor "by virtue of this section, the amount of any relief which may "be claimed by him under rule 8 of No. V of Sch. A shall be "such amount as could have been claimed by him if the annual "value of the unit had been determined in the manner described "in subsection (1) of this section. (4) A lease shall be deemed "to be a lease to which this section applies if, and only if, the "following conditions are fulfilled with respect to it—(*a*) that it "is a short lease; (*b*) that the land comprised in it is or forms "part of a single unit of assessment; (*c*) that the rent under it "is payable to the immediate lessor of that unit; (*d*) that the "estate or interest of the immediate lessor of that unit is not, as "respects any part of that unit, subject to any short lease which "comprises also land not wholly within that unit, being a lease "the rent under which is payable to that immediate lessor."

The expression "immediate lessor" is by section 13 (1) of the Finance Act, 1940, defined in relation to any premises as—"(*a*) if different parts of the premises are the subject of separate "tenancies or separate occupations, a lessor of the whole or any "part of the premises whose estate or interest extends to the "entirety of the premises and is not subject, immediately or "mediately, to a lease of the entirety thereof; and (*b*) in any "other case, a lessor whose immediate tenant is occupying or "entitled to occupy the entirety of the premises: Provided that "if, in any case to which paragraph (*a*) of this definition applies, "there is more than one lessor satisfying the conditions set out "in that paragraph, that one of those lessors shall be deemed to "be the immediate lessor whose estate or interest is not rever"sionary on the estate or interest of any of the others." The portion of this definition that is applicable to the present case is the portion at (*b*) above. The phrase "short lease" is defined by section 13 as a lease which is not a long lease; and "long "lease" means a lease granted for a term exceeding 50 years, other than a lease which is or takes effect as a lease for a term of years determinable after the death or marriage of any person. The phrase "unit of assessment" means, by the same section, any land which forms a unit of assessment for the purposes of Sch. A.

The respondent does not dispute that the "excess" in respect of which he is chargeable to tax under Case VI of Sch. D has been correctly calculated in accordance with section 15 of the Act of 1940. For example, he held 22 Oxford Street on a short lease and relet it at a net rent of £3,500. The actual Sch. A assessment on this property was £2,100, but if its annual value had been determined by reference to the rent he received it would have been £3,500. The rent payable by him is not stated in the case stated, but it was less than £2,100, or at any rate not more than that figure, and consequently the excess to be charged to tax under section 15 was £1,400. Similar calculations in 22 other cases bring out other figures of "excess," making a total of £4,830.

The respondent, however, claims to deduct from or set off against this total of £4,830 losses which he has sustained in five other instances. For example, he took a short lease of 220 Edgware Road at a rent of £550, but only succeeded in reletting it at a rent of £100. The rent of £550 paid by the respondent exceeded the net annual value of this property for the purpose of Sch. A. Comparing the rents paid and received, he sustained a loss of £450. The question to be decided is whether, in virtue of section 27 of the Finance Act, 1927, he is entitled to set off this and four other similar losses totalling £3,575 against the £4,830.

Section 27, Finance Act, 1927, is as follows: "(1) Where in "any year of assessment a person sustains a loss in any trans-"action, whether he was engaged therein solely or in partnership, "being a transaction of such a nature that, if any profits had "arisen therefrom, he would have been liable to be assessed in "respect thereof under Case VI of Sch. D, he may claim that "the amount of the loss sustained by him shall, as far as may "be, be deducted from or set off against the amount of any profits "or gains arising from any transaction in respect of which he is "assessed for that year under the said Case VI, and that any "portion of the loss for which relief is not so given shall, as far "as may be, be carried forward and deducted from or set off "against the amount of any profits or gains arising from any "transaction in respect of which he is assessed under the said "Case VI for any of the six following years of assessment. (2) In "the application of this section to a loss sustained by a partner "in a partnership the expression 'the amount of any profits or "'gains arising from any transaction in respect of which he is "'assessed' shall be taken to mean in respect of any year such "portion of the amount on which the partnership is assessed "under Case VI in respect of any transaction as he would be "required under the Income Tax Acts to include in a return of

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" his total income for that year. (3) Any relief under this section " by way of the carrying forward of the loss shall be given as far " as possible from the first subsequent assessment in respect of " any such profits or gains as aforesaid for any year within the " said six following years, and, so far as it cannot be so given, " then from the next such assessment and so on. (4) The provisions of this section shall extend so as to apply to a loss " sustained in the year ending on April 5, 1927."

This section cannot, of course, have been framed with section 15 of the Act of 1940 in mind, for it was enacted 13 years earlier. Sir Frank Soskice pointed out that its introduction may well have been due to such decisions as *Ryall* v. *Hoare*[25] and *Lyons* v. *Cowcher*.[26] The effect of those decisions was to make the profits of certain isolated transactions taxable under Case VI, and without section 27 the taxpayer would have been without redress if in a subsequent year a similar transaction of his left him with a loss. The question now to be decided, however, is not what were the illustrations of hardship which the legislature had in mind when the taxpayer was given the relief under section 27, but what upon its true construction is the extent of the operation of section 27, and whether it authorizes the setting off of these losses in the present case.

The argument of the appellant that section 27 does not apply involves two main contentions, first, that the loss was not sustained "in any transaction," and, secondly, that, even if it was, it was not "a transaction of such a nature that, if any profits "had arisen therefrom, the respondent would have been liable to "be assessed in respect thereof under Case VI of Sch. D."

In my opinion, there was in each case a transaction out of which the loss arose. The transaction consisted in taking a lease of property with a view to reletting it and either succeeding or failing to relet it. It is just as much a transaction as would be the purchasing of an article by a trader, who seeks to resell it at a profit, and who either does sell it at such a profit or sells it at a loss or does not succeed in selling it at all. On the facts of the present case there clearly is a transaction, and this was the view of every member of the Court of Appeal. If all that could be said was that an owner of property, freehold or leasehold, had tried to find a tenant for it and had failed, it would be a question whether his unsuccessful effort could be regarded as a transaction. A similar difficulty would arise if the taxpayer had become the owner of property by bequest or inheritance, which he failed to relet. But, in the present case, no real difficulty arises on this first point.

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[25] [1923] 2 K.B. 447.

[26] 10 Tax Cas. 438.

On the second and much more difficult point, the appellant's argument is that "loss" means what he calls "commercial "loss," and that, correspondingly, "profits," where this word first appears in section 27, means what he calls "commercial "profits." Assuming this, he then argues that section 15 of the Act of 1940 does not assess a dealer in property on the commercial profits he might make from reletting, since the "excess" on which tax under Case VI of Sch. D is charged is the result of a formula. The formula might bring out a figure of excess when there was no commercial profit, and there might be commercial profit though the formula would bring out no excess to be taxed. Finally, it is argued that before a set-off of loss under section 27 can be authorized, the total figure of profits referred to in the section, neither more nor less, must be liable to be assessed under Case VI of Sch. D, and that this condition is not fulfilled in these transactions.

I agree with the majority in the Court of Appeal in thinking that these arguments are unsound. It is not disputed that losses occurred to the extent claimed, and even if the word "loss" is treated as equivalent to "commercial loss," this would not justify interpreting the word "profits" as meaning something different from what the law of income tax regards as profits. The appellant suggests that "profits or gains" lower down in the section is to be contrasted with the word "profits" standing alone. This is not so. Lord Halsbury, in an income tax case with a name which only Welshmen can pronounce—*Ystradyfodwg and Pontypridd Main Sewerage Board* v. *Bensted* [27]—observed: "It appears to me that there is a mixture, not to say a con- "fusion, of thought in using the word 'profits' in a sense which "is not consistent with the mode in which it is used in the "statutes relating to income tax." "Profits" means "profits "or gains" in the income-tax sense, and this can be illustrated from many places in income-tax legislation, for example, in the Rules relating to Case III of Sch. D. Lord Wrenbury pointed out in *Kensington Income Tax Commissioners* v. *Aramayo* [28] that income-tax legislation is not entirely consistent in using the same phrase for the same thing throughout.

The question, therefore, comes to be whether the tax imposed on an "excess" under Case VI of Sch. D is to be regarded as a tax in respect of profits or gains. Case VI itself is described as "tax in respect of any annual profits or gains not falling "under any of the foregoing Cases, and not charged by virtue "of any other Schedule." It appears to me that the tax on "excess" under section 15, assessed as it is under Case VI, must be regarded as a tax in respect of annual profits or gains, notwithstanding that the figure of assessment is arrived at by the formula contained in the section. Tax under Sch. A remains unaffected; section 15 does not modify or enlarge the operation of Sch. A in any way. The section imposes, in the circumstances to which it applies, a tax on an "excess" which is assessed under a different Schedule, and which is paid by the immediate lessor. Once the conclusion is reached that the tax on this "excess" is a tax in respect of profits and gains, the main difficulty which has been suggested by the appellant disappears.

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[27] [1907] A.C. 264, 267.

[28] [1916] 1 A.C. 215, 225.

This conclusion is reached by putting a correct interpretation on the relevant sections, but it is legitimate to add that it is also the conclusion which one would expect, for there are many instances in income tax law where Parliament has thought proper to allow losses to be brought into account for the purpose of reducing what would otherwise be the taxpayer's liability.

I move that the appeal be dismissed with costs.

LORD NORMAND. My Lords, the respondent, who is a dealer in property, made a practice of acquiring leasehold properties with a view to subletting them at a profit. In the year ended April 5, 1943, he had 28 such properties of which 23 had been sublet by him, each of them at a rent in excess of the sum at which it had been assessed under Sch. A. The difference between the aggregate of the rents under the subleases for these properties and the aggregate of the Sch. A assessments was £4,830. The excess of the aggregate of the sub-rents over the aggregate of the rents paid by the respondent in respect of the same 23 properties was a still larger sum. Of the remaining five properties the respondent failed to let three, and two had been sublet by him at rents lower than those payable by him. The difference between the rents received by the respondent and the rents paid by him in respect of these five properties was £3,750.

The assessment for the year 1942–43, now under appeal, was made under Case VI of Sch. D by virtue of section 15 of the Finance Act, 1940, in respect of the excess of the aggregate rents received by the respondent for the 23 properties over the aggregate of the Sch. A assessments. The original assessment was for the estimated sum of £5,000, but the special commissioners have corrected it to the sum of £4,830. Assessments on the same principles were made for the years 1940–41 and 1941–42. They also are under appeal and the decision on the assessment for 1942–43 will govern them.

It is admitted by the respondent that he was liable by virtue of section 15 of the Finance Act, 1940, to be assessed to income tax under Case VI of Sch. D on the " excess " in respect of the 23 properties. But he claims that under section 27 of the Finance Act, 1927, he is entitled to deduct from that excess the loss of £3,575 suffered on the other five properties.

Before section 15 of the Finance Act, 1940 (which I call " section 15 " for short hereafter), came into force the total income-tax liability in respect of the 23 properties would have been ascertained and measured by the assessment made under Sch. A. That is not to say that the respondent would have been entitled according to income tax law to enjoy part of his profit free of tax. In principle, income tax is a single tax levied upon the whole profits or income of the subject, and it is assessable, according to the nature of the profits, under one or other of the Schedules of the Act. The whole taxable profits from property were assessable under Sch. A and an assessment under that Schedule exhausted the tax liability of the lessor in respect of it. Sch. A is based on annual value, and annual value was the measure of the whole taxable profits from the property. These principles were settled by decisions of this House in *London County Council* v. *Attorney-General* [29] and *Fry* v. *Salisbury House Estate Ld.*[30]

Section 15 innovated upon these principles. The reason for the innovation appears to have been two-fold. *Fry* v. *Salisbury House Estate Ld.*[30] had shown that, whatever might be the theory of the Income Tax Acts, there might be a margin between the annual value of property and the actual net receipts of the lessor, and after the quinquennial valuation of property was suspended by section 27 of the Finance Act, 1940, this margin became of greater importance. It was, therefore, considered expedient to deal with the discrepancy by new legislation even at the cost of violating the principle that a Sch. A assessment subjects to tax the whole profits from property.

Section 15, which deals with leases for a period not exceeding

[29] [1901] A.C. 26.

[30] [1930] A.C. 432.

50 years, imposes a tax upon an "excess." It involves a subtraction sum, in which the figure in the upper line is the amount of a notional Sch. A assessment (as reduced for the purposes of collection) based on an annual value determined by reference to the rent under the lease and the other terms of the lease, and the sum to be subtracted is the greater of (a) the amount of the actual Sch. A assessment (as reduced for the purpose of collection) or (b) the rent payable by the immediate lessor. The excess so arrived at is made chargeable to tax under Case VI of Sch. D.

The first thing to notice about the provisions of the section is that they do not in any way affect the Sch. A assessment, nor is the new tax liability created by them a tax liability under a Sch. A assessment, though both the actual Sch. A assessment and a notional Sch. A assessment are used in computing the taxable profits. The tax is in fact a new tax upon taxable profits derived from property, which are now not to be deemed to be exhaustively charged under Sch. A. It is a tax under Sch. D, Case VI, and, therefore, by definition a tax in respect of profits or gains not falling under any other schedule. Accordingly, the total profit is divided into two parts, one assessable under Sch. A and the other under Sch. D, Case VI, but both parts are "profits" or "profits and gains" in income tax law.

It is under section 27 of the Finance Act, 1927 (which I shall call "section 27" for short hereafter) that the respondent claims to deduct "losses" in respect of the five properties. This section was, no doubt, enacted in order to redress an injustice which arose when the profits of an isolated transaction of a commercial nature (as in *Ryall* v. *Hoare* [31] and *Lyons* v. *Cowcher* [32]) were taxed under Case VI, and when in another year a similar transaction resulted in a loss which could not be set off against the taxed profits. But the origin of the section is irrelevant, and the only relevant question is whether the respondent can bring himself within the language of the section.

If the respondent is to succeed, he must show (1) that as regards the five properties he had engaged in a "transaction" within the meaning of the section; (2) that he made a loss in the transaction; and (3) that the transaction was "of such a "nature that, if any profits had arisen therefrom, he would have "been liable to be assessed in respect thereof under Case VI of "Sch. D."

Neither the Special Commissioners nor Wynn-Parry J. decided

[31] [1923] 2 K.B. 447.

[32] 10 Tax Cas. 438.

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whether there was a transaction within the meaning of section 27. All three members of the Court of Appeal held that there was a transaction. In my opinion, "transaction" is a comprehensive word which includes any dealings with property. The "transaction" entered into by the respondent as a dealer in property was the acquisition of leases of property, the attempt to sublet at a rent in excess of the rent payable by him, and the success or failure of this attempt. I therefore agree with the Court of Appeal on this point. I see no difficulty on the facts of this case, though there may well be difficulty on other facts.

That the respondent sustained a loss in the transaction as regards the five properties admits of no doubt. The loss is ascertained by ordinary business methods. But though the Income Tax Acts do not impose a special meaning on the word "loss," the loss is none the less a loss in the sense in which the income tax law has regard to losses.

The real crux of this appeal, however, is the meaning of the word "profits" in section 27. "Profits" and "profits and "gains" are terms often used interchangeably in the Income Tax Acts with the meaning "assessable" or "taxable profits" (*London County Council* v. *Attorney-General*[33]). In my opinion, that is the meaning of the word "profits" standing alone in section 27, as it is also the meaning of the words "profits and "gains" lower down in the section, and it is impossible to draw a distinction which would assign to the words "profits and "gains" the ordinary meaning in income tax law and to "profits" the meaning of commercial profits.

The Crown contended that since the word "loss" means "commercial loss," the word "profits" must correspondingly mean commercial profits. It was further suggested that unless that were so, some absurdity would result such as arises when peas are to be deducted from beans. The difficulty is imaginary, for there is nothing absurd in a contrast between losses and profits, provided that the losses and profits are reckoned on principles recognized by income tax law, though for each of them a different but appropriate mode of reckoning is used. The Crown maintained, as a last resort, that a tautology is involved if "profits" means assessable or taxable profits. That is not so. The words "he would have been liable to be assessed in "respect thereof under Case VI of Sch. D" define or describe the category of taxable profits which would have arisen from a transaction, if it had had a successful issue. The section is not saying the same thing twice; it is saying two things—that the transaction would have given rise to taxable profits, and, that these profits would have been assessable under Case VI of Sch. D. Given that the word "profits" means taxable or assessable profits, the respondent has to show that if the transactions as regards the five properties which led to a loss had given rise to any profits, he would have been liable to be assessed in respect of them, and of the whole of them, under Case VI of Sch. D. The section does not expressly say that all the profits would have been assessable under Case VI, but I think the Crown was right in submitting that that was its meaning. It is, however, quite plain that all the profits, if there had been any, would have been assessable under Case VI. In strictness, it may be more accurate to say that the whole profits would have been liable to be assessed under section 15 and would have been chargeable under Case VI of Sch. D. But the language of the Income Tax Acts does not always strictly observe the distinction between assessing and charging. The Crown did indeed show that if "profits" means commercial profits, not all these profits would be chargeable under Case VI, Sch. D. The example given was a subletting at a net rent greater than the rent payable by the lessor but less than the Sch. A assessment. But this argument falls to the ground if "profits" is given its correct meaning. Then it was said that not all the taxable profits were assessable under Case VI of Sch. D, because the Sch. A assessment remained and tax would still be payable in respect of it. The answer to this is that it is impossible to say that profits and gains assessable under Sch. A arise from the transaction. The very reason for the enactment of section 15 was to create a new liability to tax with new rules of assessment in order to trap "profits and gains" which Sch. A failed to trap; and the Sch. A assessment would have been the same both in amount and in the ultimate liability whether there had been a "transaction" or not. In view of the terms of section 15 and the express provision that the profits shall be chargeable under Case VI of Sch. D, I find it impossible to accept the view that the new tax is an additional Sch. A tax directed to more effective taxation of "annual value."

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[33] [1901] A.C. 26, 45.

I therefore agree with my noble and learned friend on the woolsack that the appeal should be dismissed.

LORD OAKSEY. My Lords, I agree that this appeal should be dismissed.

Sir Frank Soskice's main argument, if I understood him aright, was, first, that the word "profits" as first appearing in section 27 of the Finance Act, 1927, means actual profits and not profits computed in accordance with the Income Tax Acts; secondly, that the word "any" in the same line of that section means "all"; thirdly, that section 15 of the Finance Act, 1940, in charging to tax excess rents does not charge profits within the meaning of section 27 of the Act of 1927; and lastly, that, in any event, as the properties in question are assessed under Sch. A it cannot be said that "all" the profits which arise from such a transaction as those in question are liable to be assessed under Case VI of Sch. D. In my opinion, these arguments are fallacious.

The word "profits" cannot mean actual profits since the hypothesis is that if there had been profits arising from the transaction they would have been liable to be assessed under Case VI of Sch. D. The words used are to define the nature of the transaction in which a loss, if sustained, may be set off against profit from any transaction which had been assessed on the taxpayer under Case VI of Sch. D.

In the next place, the word "any" before "profits" in section 27 (1) does not, in my opinion, mean "all." The word can mean "all" but it can also mean "some." But it is also necessary to interpret the words "if any profits had arisen therefrom." The transactions in question were the subletting or attempting to sublet properties of which the respondent was the lessee and the profits which arose therefrom were not the profits chargeable under Sch. A. Sch. A is a tax on the ownership of land, not on its letting, although rent is used as the measure of the tax.

Sir Frank Soskice then argued that the profits and losses which arise from such transactions as these do not arise from them within the meaning of section 27, and that the transactions are merely instances of causa sine qua non, but I do not think any such investigation of the nature of causes is necessary for the true interpretation of the section. Section 27 of the Act of 1927 and section 15 of the Act of 1940 both deal with profits which are liable to be assessed under Case VI of Sch. D and not with profits assessable under Sch. A or any other schedule. Section 27 is a perfectly general section providing for a set off of losses against profits which are assessable under Case VI of Sch. D. When, therefore, the Act of 1940 made excess rents chargeable under the same Case of Sch. D it required clear words to show that it was not the intention that losses arising from transactions of the same nature should not be set off against such profits.

What the taxing authorities have to investigate is whether there has been a transaction in which, if it had resulted in a profit, that profit would have been assessed under Case VI of Sch. D: if there has been such a transaction and the transaction has resulted in a loss, then that loss may be set off against any profits which have been assessed under Case VI of Sch. D in respect of transactions for that year.

LORD REID. My Lords, the respondent acquired a number of leases with a view to subletting the properties at a profit. In the year in question in this case, 1942–43, he was successful in this in many cases, but in other cases he incurred losses either because he had to sublet at rents lower than the rents which he paid, or because he could not sublet at all, so that in that case the whole rent which he paid was a loss to him. He now seeks to set off those losses against certain assessments under Case VI of Sch. D in respect of the cases where he made profits, and I think that the question whether he is entitled to do that is best approached by considering first what the position would have been if these events had occurred before 1940 and then considering the effect of section 15 of the Finance Act, 1940, and section 27 of the Finance Act, 1927.

If section 15 had not been passed the position would have been that when the respondent acquired the leases he became liable in each case on coming into occupation to pay income tax on the amount of the Sch. A assessment, but in paying rent to his lessor he was entitled to deduct tax at the standard rate from that rent up to a maximum of the amount of tax which he had himself paid. So if the rent which he paid was equal to or exceeded the amount of the Sch. A assessment he passed on the whole burden of tax, and in the end bore no tax himself. But if the rent which he paid was less than the amount of the Sch. A assessment he could not pass on the whole burden but had to bear tax himself to the extent of the difference between the whole tax payable and the amount which he could deduct from the rent which he paid. If he sublet he never had to pay any more tax however large the rent might be which he got from the subtenant and however large his profit from subletting might be. On the other hand, he got no relief if he failed to sublet. And if he sublet at a loss all that he was able to do was to pass to the subtenant any liability to pay tax under Sch. A: he could get no relief in respect of his loss through paying more rent than he received. There are a number of provisions in the Income Tax Acts which permit losses of various kinds to be taken into computation in various ways, but there was none which then applied to a loss of that character.

The Finance Act, 1940, contains provisions for the taxation of lessors who make profits. It deals differently with long leases and short leases. All the leases with which this case is concerned were within the definition of short leases in the Act and came within the scope of section 15. The provisions of the Act dealing with long leases are so different that I do not think that any assistance can be got from them in interpreting section 15, and I do not propose to consider them further.

The provisions of section 15 do not alter in any way rights or liabilities in respect of assessment or taxation under Sch. A. They create a new subject of taxation assessable under Case VI of Sch. D, and Case VI deals with profits or gains not falling under any other Case of Sch. D and not charged by virtue of any other Schedule. It is true that the provisions of section 15 involve, as a step in the calculation which it directs, a notional revaluation of the property according to the Rules applicable to Sch. A, and that in certain cases the actual Sch. A assessment must be taken into account as a deduction. And it may well be that the reason, or one of the reasons, for these provisions in the Act of 1940 was that on account of delay in revaluation for the purpose of Sch. A those who let property were thought to be inadequately taxed. So the provisions of section 15 can be regarded as supplementary to Sch. A. But they are not an extension of Sch. A. They tax a new kind of profits or gains, and they tax it under Case VI of Sch. D because it does not come within the scope of any other Schedule or Case. Moreover, liability to pay tax under section 15 is imposed directly on the lessor who makes the profit, whereas the occupier pays tax, at least in the first instance, under Sch. A.

Section 15 imposes liability to tax if a notional revaluation of the property, based on the rent which the taxpayer actually receives, exceeds whichever is the greater of the actual Sch. A assessment or any rent which he has to pay under a short lease. Broadly speaking, that is a case where the taxpayer has made a profit by letting or subletting and where tax on the amount of his profit would exceed the tax due under Sch. A, or such part of that tax as he has to bear himself: and the amount of tax

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payable under section 15 when added to the tax under Sch. A or that part of it which he bears himself will roughly correspond to what he would have had to pay in tax if he had had to pay nothing under Sch. A but had been taxed on his whole profit from letting or subletting the property. The correspondence may be far from exact because, as is well known, allowances under the Rules applicable to Sch. A may differ widely from expenses which the taxpayer has had to incur.

It must have been fairly obvious when section 15 was enacted that there would be cases of the kind to which it applies where the taxpayer incurred a loss—as the respondent did here in some instances. Section 15 is silent about such cases. The respondent says that that is because the terms of section 15 are such as to bring section 27 of the Finance Act, 1927, into operation with regard to such losses, and, therefore, Parliament must be held to have intended that losses should be dealt with under that section. The appellant denies this, and contends that the respondent must pay tax under section 15 in respect of adventures in which he has made a profit without any deduction in respect of any other adventures in which he has made a loss: the appellant asserts that section 27 has no application to losses of this character, and if that is right it follows that Parliament must be held to have intended that this new tax should be paid in every case where the taxpayer has made a profit sufficient to bring section 15 into operation without the taxpayer having any right to bring into computation losses which he has sustained in other cases of exactly the same kind.

So the case turns on the proper interpretation of section 27. That section applies where and only where " a person sustains a " loss in any transaction . . . of such a nature that, if any " profits had arisen therefrom, he would have been liable to be " assessed in respect thereof under Case VI of Sch. D "; and it allows such a loss to be " deducted from or set off against the " amount of any profits or gains arising from any transaction in " respect of which he is assessed for that year under the said " Case VI," with a provision for carrying forward losses which cannot be so set off. At first sight the provisions of section 27 might appear to fit the present case exactly. There is no doubt that the respondent sustained a loss, and there is no doubt that each of the operations in which he sustained the losses was of such a nature that, if it had been more successful, section 15 of the Act of 1940 might have applied and the respondent would then have been chargeable to tax under Case VI in terms of

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that section. And the respondent only seeks to set off his losses against assessments under Case VI. But the appellant argues that that is not enough to satisfy the requirements of section 27.

In the first place, the appellant contends that the respondent's operations in which he sustained loss were not "transactions" within the meaning of the section. I can see no substance in this contention, and I agree with your Lordships that it is wrong.

Then the appellant founds on the limited nature of the wording of the condition "if *any profits* had arisen therefrom, "he *would* have been liable to be assessed *in respect thereof* "under Case VI." First he says that section 15 of the Act of 1940 is not dealing with profits: no doubt there must be profit before it can apply but it does not tax profits, it taxes excess rents: if profits arise there may be an assessment under Case VI but it will not be an assessment "in respect thereof," and therefore the condition in section 27 of the Act of 1927 is not satisfied. I think that the answer to that can be shortly stated. Chargeability under section 15 must be in respect of profit of some kind. The fact that Case VI applies shows that profit is being dealt with: the definition of Case VI at the beginning of Sch. D makes it clear that Case VI only applies to "annual profits or gains" and it is well established that the words "or gains" add nothing to the word "profits." The calculation which section 15 directs is simply the method by which the profits from the transaction are to be measured for income tax purposes, and the assessment and charge to tax under the section are in respect of the profits so measured.

Then the argument for the appellant is put in another way. He says that, whatever "profits" may mean in section 27, this section has no application to a case where, if "profits" had arisen, those "profits" might or might not have been assessable under Case VI. So far I think that he is right. The section requires that if any profits had arisen the taxpayer *would* have been liable to be assessed—not *might* have been liable to be assessed—under Case VI. Then he says that "profits" must mean actual or commercial profits, and that such profits might arise in a case of this kind without there being any possibility of an assessment under Case VI. If that were the meaning of "profits" here again I would agree with him. There can be no assessment under Case VI unless there are sufficient profits to bring section 15 into operation, and there can be actual or commercial profits in a case of this kind without there being any such profits. For example, let me suppose a property with a Sch. A assessment of £500. If a taxpayer acquires a lease of that property under which he pays a rent of £200 and then sublets it for a rent of £350 he makes a profit. The commercial profit might be somewhat less than £150, the difference between the rent he pays and the rent he receives, because there might be expenses which could be deducted from the gross profit. But I assume that there would be a substantial profit. Nevertheless, section 15 would not apply and there could be no assessment under Case VI. Section 15 only applies if the notional revaluation based on the rent which the taxpayer is receiving exceeds whichever is the greater of the Sch. A assessment or the rent which he pays, and here the notional revaluation though exceeding the rent which he pays would not exceed the Sch. A assessment. So there would be an actual profit but no liability to assessment under Case VI.

But I do not agree that " profits " in section 27 means actual or commercial profit. In legislation dealing with income tax one might expect profits to mean profits in the income-tax sense or profits which have been made subject to taxation, and that is not by any means the same thing as actual profits in a commercial sense: in some cases taxable profits are more than actual profits and in other cases less. Moreover, when section 27 refers to profits in respect of which the taxpayer would have been liable to assessment it must, I think, be referring to profits in the income-tax sense, because it is only in respect of such profits that a taxpayer can ever be liable to assessment. It appears to me that what the section means is that the transaction must be of such a nature that, if any assessable profits arise from it, the taxpayer will be liable to assessment in respect of those profits under Case VI of Sch. D, and not under some other Case or Schedule.

The appellant's argument that " profits " means actual profit was based largely on the contrast which is made in the section between " loss " and " profits." It was said that loss must mean actual loss and, therefore, profits must mean actual profits. I do not think that the argument is valid. The section later makes the loss deductible for income tax purposes and that would indicate that loss must mean loss in an income-tax sense or a loss which can properly be taken into computation for income-tax purposes. In a way, I think that the appellant's argument is right: there is no Rule applicable to Case VI which deals with losses, and no special meaning attaches to the word in this context; so one takes actual loss into this income-tax computation. But that is not taking actual loss in contradistinction to income-tax loss: that is taking actual loss because in this case it corresponds with loss in the income-tax sense. If that is so, there is plainly no reason to suppose that "profits," when contrasted with loss in this sense, means anything but profits in the income-tax sense.

If that is right the crucial question comes to be this: Could there be assessable profits from a transaction of this kind which were not assessable or chargeable under Case VI of Sch. D but were assessable or chargeable under some other Schedule or Case? The appellant maintains that there could be. Taking the example which I have already given—Sch. A assessment £500, rent paid by the taxpayer £200, rent received by him £350 —the appellant would say that the taxpayer's actual or commercial profit of £150 (or somewhat less) would be an assessable profit and would be assessed under Sch. A. But in my opinion it would not be an assessable profit at all. So long as there is no revaluation for the purposes of Sch. A it cannot come into any computation or calculation for income-tax purposes, and the amount of the Sch. A assessment would be exactly the same whether that profit had been made or not, and even on a revaluation the amount of the profit from subletting would be irrelevant, though the rent under the sublease might be important. Until the profits from subletting are of such a character as to bring section 15 of the Act of 1940 into operation they are not profits in respect of which anyone is liable to be assessed, and if those profits are such as to bring section 15 into operation then the only assessment in respect of them will be the assessment under Case VI of Sch. D which section 15 directs. So it follows that the condition in section 27 of the Act of 1927 is satisfied. These transactions are of such a nature that if any profits which were assessable arose from them those profits would in every case be assessable under Case VI of Sch. D and could in no case be assessable under any other Case or Schedule. Accordingly in my judgment this appeal should be dismissed.

LORD ASQUITH OF BISHOPSTONE. My Lords, I concur. The activity on which the respondent was engaged was that of acquiring property—freehold or leasehold—with the design of letting, or reletting it at a commercial profit to himself. Under

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Fry v. *Salisbury House Estate Ld.*[34] it had been established that profit resulting from a transaction of this kind and consisting of the difference between net outlay and net return, could not be taxed as such under Sch. D, and that the only income tax liability which could attach in such a case was one on the annual value of the property under Sch. A. This was held to exhaust the tax gatherer's rights. The system worked fairly, so long as Sch. A value was frequently revised and so kept in step with commercial value. But when, during the war, quinquennial revaluations under this Schedule were suspended, an increasing disparity declared itself between the old Sch. A values and the rents which the premises in fact commanded in the market, and therewith an increasing tax-free commercial profit lodged in the hands of the entrepreneur.

Section 15 of the Act of 1940 was clearly designed to " catch " this profit. It might have provided—I leave aside for the sake of simplicity, freeholds—that in the case of property acquired on lease and relet, the subject matter of tax should be simply and in all cases the difference between rent payable and rent receivable, less expenses. It did not in fact so provide. The new, and the only new, subject-matter of tax was what may be called for short " excess rents ": a figure arrived at by the application of an arbitrary formula laid down in the section. Excess rent (again leaving freeholds for simplicity out of account) would very frequently be the excess of the rent at which the premises were relet, over the Sch. A value, a figure which might be almost unrelated to actual commercial profits. (The wording of the section is complex but I do not think this statement is a dangerous over-simplification of its gist, at least on the facts of this case.) The section provided that " excess rent," computed according to this formula, should be " chargeable under Case VI " of Sch. D." Case VI deals, and deals solely, with " profits or " gains " in the income-tax sense of those terms: and it is impossible to suppose that the section would have operated differently if it had provided in terms that excess rents should be " deemed to be ' profits or gains ' within Case VI " and chargeable as such.

The short point in this appeal is whether in a transaction of this kind losses, in any and what sense of that term, can be set off against profits, in any and what sense of that term: for while 23 of the 28 properties in this case were relet at a profit, five

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[34] [1930] A.C. 432.

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were relet at a loss. The answer depends mainly on the construction of section 27 (1) of the Finance Act, 1927, and on the application of its language (and in particular of the word "profits") to the new subject-matter of taxation created by section 15 of the Finance Act, 1940. The first five lines of section 27 (1) read as follows: "Where in any year of assessment a person sustains a loss in any transaction, whether he was engaged therein solely or in partnership, being a transaction of such a nature that, if any profits had arisen therefrom, he would have been liable to be assessed in respect thereof. . . ." The word "loss" has, it would seem, no esoteric significance in fiscal statutes, and the respondent concedes (if it be a concession) that it may be taken to mean ordinary commercial loss, as when I take premises on lease at £500 a year and relet them at £200 or fail to relet them at all. But what of the word "profits" later? The main contest was about the meaning of this word. Does this mean, in a transaction of this kind, actual commercial profit, or does it mean the notional profit represented by the "excess rent" as defined in section 15 of the Act of 1940; a "profit" which is capable of existing where there is no commercial profit at all, or where such a profit exists, may bear little or no mathematical relation to it?

Section 27 (1) bids us to envisage "transactions" of various kinds. Your Lordships are only concerned with its construction in relation to the type of transaction involved in the present case. In regard to such a transaction (resulting in an actual loss) we are enjoined to ask whether, if any "profit" had arisen therefrom, the taxpayer would have been "liable to be assessed thereon under Case VI of Sch. D." If, and only if, the answer to this question is "Yes," can the loss be set off against the profit on other transactions, similar or dissimilar, in respect of which he is assessed in the same year.

The main argument of the Crown was that "set off" involves deduction and can only exist when the thing sought to be deducted and the thing from which it is sought to deduct it, are homogeneous. ("You cannot deduct peas from beans.") And that since the losses are, ex concessis, true commercial losses, the profit we are bidden to imagine in the passage must, to enable a "set off," be true commercial profits, not the conventional or notional profits represented by excess rents in section 15 of the Act of 1940.

I agree with your Lordships in rejecting this contention. It seems to me that the subtraction of an actual loss from that

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which, by section 15 of the Act of 1940, is deemed to be a profit is the subtraction not of peas from beans but of like from like, viz., of a sum of money from another sum of money, and these are none the less homogeneous because the second sum is to be computed artificially. In a transaction of this character the only "profits" which can be assessed under that Case are the excess rents which are deemed to be "profits or gains" by section 15 of the Finance Act, 1940, and these have no necessary relation to "commercial" profits, and may totally diverge therefrom. I agree with my noble and learned friend on the woolsack that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Solicitor of Inland Revenue; Tobin & Co.*

[HOUSE OF LORDS.]

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June 17, 18, 19, 23, 24, 25;
July 31.

KING . . . . APPELLANT;

AND

KING . . . . RESPONDENT.

Husband and Wife—Divorce—Cruelty—Husband's petition—Nagging—Matters to be taken into consideration.

A husband petitioned for divorce from his wife on the ground of cruelty consisting of constant nagging by complaints of his adultery and light conduct with other women, though only in one case were her charges well founded. There had been in his conduct divers suspicious circumstances as to which the judge accepted his explanations, regarding him as a more reliable witness than his wife. There was evidence that the wife's conduct had caused injury to the husband's health. The judge granted him a decree. The Court of Appeal reversed his decision on the ground that the judge had not given consideration to the question whether there was any justification for the wife's conduct. On the husband's appeal to the House of Lords:—

Held (*per* Earl Jowitt, Lord Normand and Lord Reid, Lord Oaksey and Lord Asquith of Bishopstone dissenting) that conduct amounting to cruelty had not been established.

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* *Present*: EARL JOWITT, LORD NORMAND, LORD OAKSEY, LORD REID and LORD ASQUITH OF BISHOPSTONE.

In considering a charge of cruelty by nagging the right approach is not to ask first whether the conduct of the respondent spouse was cruel in fact and then to examine whether it could in any way be justified. The question whether a spouse has behaved cruelly is a single one and can only be answered on a consideration of the whole matrimonial relations.

+ Ld Reid

Per Earl Jowitt and Lord Normand: When Bucknill J. in *Horton* v. *Horton* [1940] P. 187, 193, laid it down that cruel conduct must be "wilful and unjustifiable" he was not propounding an exhaustive test in all cases, since, for example, wilful accusations, made by one spouse against the other, which are untrue and for which there are no probable grounds, may not amount to cruelty if they have been provoked by the cruel conduct of the other spouse.

Decision of the Court of Appeal [1951] W.N. 545 affirmed.

APPEAL from the Court of Appeal (Denning and Hodson L.JJ., Somervell L.J. dissenting).

On May 26, 1950, Godfrey Howard King petitioned for the dissolution of his marriage, which took place on June 12, 1946. He alleged cruelty, consisting of constant nagging, by complaints of his adultery and of his light conduct towards women; the nagging, he said, resulted in injury to his health. He admitted committing adultery four times with one woman between August, 1948, and February, 1949. His wife, Elizabeth Rosa King, cross-petitioned, alleging adultery and cruelty, but withdrew her cross-petition in the course of the hearing. Barnard J. accepted the husband's evidence when it conflicted with the wife's and granted him a decree. The Court of Appeal allowed an appeal by the wife on the ground that her conduct did not amount to cruelty. The husband appealed to the House of Lords.

The facts are fully set out in their Lordships' opinions.

Fearnley-Whittingstall Q.C. and *Colin Duncan* for the husband. The judgment of Barnard J. should not have been reversed unless he had misdirected himself, but he applied the right test, laid down in *Horton* v. *Horton*,[1] in considering whether the wife's conduct was "wilful and unjustifiable." Her conduct was directed at her husband and she must be presumed to have intended its natural consequences: see *Kaslefsky* v. *Kaslefsky*.[2] Here the judge had ample ground for finding that the wife enjoyed hurting her husband. As to cruelty without physical violence see *Jamieson* v. *Jamieson*.[3] [They also referred to *Kelly* v. *Kelly*.[4]]

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[1] [1940] P. 187, 193.

[2] [1951] P. 38.

The trial judge is the best judge of the witnesses and in that respect enjoys a great advantage over an appellate tribunal: see *Thomas* v. *Thomas*.[5] The husband should not be regarded as a guilty man when Barnard J. found him to be a truthful witness and accepted his denials or his explanations of the incidents of which the wife complained. There are no charges against him and no evidence that he has committed any matrimonial offence save the admitted adultery which was condoned.

Colin Duncan following. *Simpson* v. *Simpson*[6] explains the distinction between *Squire* v. *Squire*[7] and *Kaslefsky* v. *Kaslefsky*.[8] In cruelty cases of this description the test is substantially subjective and not objective, for what might be cruel towards one person might not be cruel towards another. Barnard J. was clearly looking at the whole of the married life of the spouses and their interaction on each other. The Court of Appeal, in holding that he applied a wrong test and in seeking to go behind what he did, are basing themselves on a misconception of what he really did.

Lloyd-Jones Q.C. and *Fairweather* for the wife. In fact Barnard J. did not apply even the test which he proposed for himself. He referred to *Horton* v. *Horton*[9] but he did not apply it. He sealed his mind off from any consideration of the husband's conduct. In his judgment he made no reference to various suspicious circumstances in the husband's conduct. The remedy for much of the husband's trouble lay with himself; it behoved him not to give occasion for further suspicions. In these cases the court must have regard to the conduct of the complaining spouse. The court must assess the impact of the personalities of the spouses on each other: see *Usmar* v. *Usmar*.[10] Pearce J., in *Lauder* v. *Lauder*,[11] puts the court's duty in a nutshell when he says that the court must consider whether the conduct of "this man to this woman" is cruel. *Kelly* v. *Kelly*[12] also lays down the court's duty in such a case. Provocation is dealt with in *Waring* v. *Waring*.[13] In *Preston-Jones* v. *Preston-Jones*[14] the House of Lords considered the degree of proof required and indicated that the case must be proved beyond reasonable doubt. That standard, which is common to all matrimonial offences, was not satisfied here.

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[3] [1952] A.C. 525, 535, 540–1, 548, 550–1.

[4] (1869) L.R. 2 P. & M. 31.

[5] [1947] A.C. 484, 487.

[6] [1951] P. 320.

[7] [1949] P. 51.

[8] [1951] P. 38.

[9] [1940] P. 187, 193.

[10] [1949] P. 1, 8.

[11] [1949] P. 277, 308.

[12] L.R. 2 P. & M. 59, 76.

[13] (1813) 2 Hagg.Con. 153, 154, 166.

[14] [1951] A.C. 391.

Fairweather following. Cruelty is a cumulative matter. One must look at the last incident of cruelty and if there has been no intercourse between the spouses after that the question of condonation does not arise. The inference to be drawn from the wife's condonation of her husband's previous offences is that she was kind and wanted the marriage to continue.

As to the question whether the wife's acts were wilful and unjustifiable, the facts here are equivocal and so they must be examined in detail to see whether there was an element of saevitia. The judge was wrong in equating justification with doing no harm. He ought to have considered all the circumstances, including the question whether there were plausible grounds for the wife's accusations. Even assuming that the court is limited to considering whether or not the wife's acts injured the husband's health and is not to consider his acts too, the court has a duty set out in *Blunt* v. *Blunt*.[15] The court should consider whether the real cause of the break of the marriage was not his adultery and his association with his former mistress who had married his brother. The court should not exercise its discretion in his favour.

Fearnley-Whittingstall Q.C., in reply, referred to *Bertram* v. *Bertram*[16] and *Moss* v. *Moss*.[17]

Their Lordships took time for consideration.

July 31. LORD NORMAND. My Lords, I am asked by my noble and learned friend, Lord Jowitt, to say that he agrees with the opinion I am about to deliver.

My Lords, after this opinion had been written I had the advantage of reading the opinion of my noble and learned friend, Lord Reid. I agree with it, and I would have said no more but for the differences of judicial opinion which the case has occasioned.

The cruelty charged against Mrs. King in this action of divorce is that she constantly nagged at her husband by complaints of his adultery or of his light conduct towards women and that by her nagging she injured his health. Two acts of violence by the wife were proved, one committed about a month and the other about a fortnight before the husband finally left her. Barnard J. regarded these acts as not in themselves serious but rather as symptomatic of the pass to which the marriage had come and of the state of mind of the parties. With this view I agree, and the case put forward is substantially one of cruelty by nagging.

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[15] [1943] A.C. 517, 526.

[16] [1944] P. 59, 60.

[17] [1916] P. 155.

Barnard J. found that the wife was a most unsatisfactory witness, and that she prevaricated, gave untruthful answers, and lost her temper with counsel. The written record of her evidence shows that she was on several occasions reproved for evading a question which she had in fact answered, and we were told that this was explained by her failure to make herself heard. But after reading the whole of her evidence I am satisfied that there is even in the written record abundant justification for the finding of the trial judge. He found that the husband was a reliable witness and accepted his testimony when it conflicted with the wife's. The result is that the husband's narrative, with his explanations and qualifications and admissions made by him in cross-examination, must be taken as a substantially accurate account of the events which led to the break-up of the marriage, and that the only ground on which the judgment of the trial judge can be successfully attacked is that he misdirected himself. That that was the position was recognized by the Court of Appeal, and the majority, Denning and Hodson L.JJ., found that there had been misdirection. Somervell L.J., on the other hand, thought that there had been no misdirection.

Barnard J. leaves no doubt about the principle which guided him in deciding whether, on the facts proved by the husband, the charge of cruelty was made out. Before he began his consideration of the evidence he said that the best guide for this class of case was a passage in the judgment of Bucknill J. in *Horton* v. *Horton*.[18] That passage, which he cites, is as follows: "Mere conduct which causes injury to health is not enough. A "man takes the woman for his wife for better, for worse. If he "marries a wife whose character develops in such a way as to "make it impossible for him to live happily with her, I do not "think he establishes cruelty merely because he finds life with "her is impossible. He must prove that she has committed "wilful and unjustifiable acts inflicting pain and misery upon "him and causing him injury to health." Barnard J. makes the comment that the last sentence is the vital part of the citation. In *Horton's* case [19] nagging, taking the form of accusations about the husband's associations with women, was one of the grounds of the action, and it is to a case of nagging that the passage cited refers. There was no doubt that the nagging had been the cause of the husband's ill-health and that it had inflicted pain and misery on him. But it had also been found that the wife's conduct towards her husband was malicious, and that the husband had throughout the consortium behaved as a good husband should. There was no disturbing element except the wife's conduct and no circumstances to be considered in relation to the accusations made by her except their falsity and the absence of any probable cause for them. That is the usual sense of the word "unjusti-"fiable" and it is the sense in which the word was used by Bucknill J. in *Horton's* case.[19] It is used in the same sense by Barnard J. in his judgment in the present case. I think that he applied the test of "wilful and unjustifiable," though there are passages in his judgment, where he is dealing with particular incidents, which lend colour to the criticism that he considered only whether the charges were false. The conclusion of his judgment is, however, the clear finding that the wife's conduct was wilful and unjustifiable.

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[18] [1940] P. 187, 193.

I have no doubt that the test whether the conduct was wilful and unjustifiable, as well as injurious, was an adequate test for what remained to be decided in *Horton's* case.[19] What is open to question is whether it can be taken to be an adequate test in all cases of cruelty by nagging accusations. I think it is not always an adequate test, and that Bucknill J. did not put it forward as a universal and exhaustive test in this type of case. The general rule in all questions of cruelty is that the whole matrimonial relations must be considered, and that rule is of special value when the cruelty consists not of violent acts but of injurious reproaches, complaints, accusations or taunts. Wilful accusations may be made which are not true and for which there are no probable grounds, and yet they may not amount to cruelty. To take an obvious example, they may have been provoked by the cruel conduct of the other spouse. There is in many cases no easy rule, no clear line of demarcation which divides cruelty from something which does not amount to cruelty. The issue may become one of great difficulty in which the decision must be largely a matter of the discretion of the judge who saw and heard the witnesses and who has considered the conduct of both parties, and the whole circumstances in relation to the temperament and character of the respondent spouse. If the trial judge in the exercise of this discretion comes to the conclusion that the conduct of the respondent is, notwithstanding the provocation received or the difficulties and stresses endured, really an inexcusable offence against the other spouse, his judgment should be respected and treated as conclusive. I have used the word "inexcusable," but "unpardonable" or "unforgivable" or "grossly excessive" would equally convey what I mean. In *Usmar* v. *Usmar*[20] Willmer J., in a case where each spouse charged the other with cruelty, said[21] that the wife's persistence in nagging her husband "went far beyond what was forgivable under the circumstances." Willmer J. said elsewhere in the same judgment[22] that he must, before coming to a conclusion, consider the impact of the personality and conduct of one spouse upon the mind of the other; and he weighed all the incidents and quarrels between them from that point of view. In my opinion, that is the proper approach to the issue and the method which ought to be followed. But it was not followed by the trial judge in the present case. It therefore becomes necessary to inquire whether, on the whole facts and in all the circumstances, the husband has proved that his wife was guilty of injurious, wilful and inexcusable conduct towards him.

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[19] [1940] P. 187.

There is much in the history of the marriage which is very relevant to the question whether the false accusations made by the wife were, in the whole circumstances, inexcusable. The wife was a Swiss and she was a Roman Catholic. She married into a Protestant family in England. The husband could only afford to pay her £2 10s. a week for food, and life was hard and domestic management difficult. The husband's business needed his close attention and he felt obliged to work late at his shop instead of spending his evenings at home. He was much attached to his mother, and, unfortunately, she had no affection for her daughter-in-law. The wife was certainly of a jealous disposition and she seems to have been deeply in love with her husband, on whose society she was specially dependent because she was a foreigner among strangers. I do not think that her jealousy was morbid or abnormal, but it was an unhappy trait in her character that if something excited her jealousy or offended her she sometimes kept silent at the time and even for a long time, and then made complaints to her husband when the incident which had given rise to them had passed from his mind. The husband was emotional, and it is clear that he was deeply in love with his wife. The evidence shows also that both spouses had strong sexual feelings and that each was physically attractive to the other. With these temperaments and in these circumstances both parties had great need of forbearance if the marriage was to be a success. The husband especially should have recognized the necessity of avoiding any conduct which might excite the wife's jealousy.

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[20] [1949] P. 1.

[21] Ibid. 9.

[22] Ibid. 7.

I do not propose to examine the evidence of the incidents which occurred in the earlier chapters of the marriage, the period from June, 1946, to the wife's first visit to Switzerland in June, 1947, and the period between her return from Switzerland in August, 1947, and her departure on her second visit to Switzerland on August 1, 1948. I agree with Barnard J. that the crucial period is the last 20 months of the marriage, from August 1, 1948, to the final parting on May 12, 1950. The events before August 1, 1948, could not possibly have warranted an action for divorce on the ground of cruelty, and at most their relevance is that they were a prelude to what happened afterwards.

It was during his wife's absence in Switzerland in 1948 that the husband formed an attachment to Mrs. Rose, and he has admitted committing adultery with her at her house, at his mother's house and in London between September 14, 1948, and the end of January, 1949. He says that when his wife left for Switzerland in August, 1948, he thought she would never come back. He seems to have had no better reason for supposing this than that she took a single instead of a return ticket and that her attitude towards him was cold when they parted. However that may be, he learnt before the end of October that she was proposing to return. He then wrote to her a letter intended to induce her to remain in Switzerland and suggesting that "it "would be wisest to be free." This letter was written when he was committing adultery with Mrs. Rose and wanted to be free to marry her. Mrs. King returned to this country on November 19, 1948. Her husband then disclosed to her that he had committed adultery with Mrs. Rose and asked her to divorce him. She, as a Catholic, refused to agree to this. They lived apart till February 25, 1949, he in his mother's house and his wife in the bungalow at Maidstone which was their home. On February 25, 1949, Mr. King returned to the bungalow to live with his wife, and the next six months were the most tranquil period of their married life. The wife's forgiveness of her husband and her reconciliation to him is, I think, a very important point in her favour in judging her conduct, but its significance was not adequately recognized in the judgment of the trial judge. All that is said about it is that it is not for the court to blame her if her conscience did not approve of divorce, and that the husband, "difficult as it was for him, and very difficult for the wife too, "made a genuine effort to make a success of his married life." The parties decided to have a child, and Mrs. King became pregnant in July. But in the meantime Mr. King's former mistress became engaged to his brother and partner, David King. This engagement took place on March 15, 1949, about six weeks after Mr. King had last committed adultery with her. This singular event did not cause any immediate disturbance of the tranquil relations then established between the parties, but the inevitable effect was only delayed. The engagement and subsequent marriage of David King and Mrs. Rose is lightly passed over by Barnard J., and I respectfully think that he failed to appreciate its importance. He merely says that it meant that Mrs. Rose was satisfactorily disposed of, but that on the other hand it meant that Mrs. Rose was living in Maidstone with the husband's brother and that it was bound to be a source of irritation to the wife. The marriage was to take place at the end of September, and in August Mrs. King had a conversation with her husband in which she called him a member of a very dirty family and said that she was going to Switzerland for the birth of the child so that the child would be born there and would never be contaminated by a very dirty father. Mr. King was a guest at the wedding. His wife did not go, and on that very day she fell ill and after a few days' illness had a miscarriage. Subsequently, in February, 1950, her husband accused her of having taken something to bring on an abortion. He had no reason to make such an accusation against his wife. Her retort that it was he who had given her something to cause a miscarriage was deplorable but it was certainly provoked. At Christmas, 1949, the husband took a turkey as a gift to his brother David and his wife. Mrs. King insisted on going with him. He went into David's house and stayed about 20 minutes, leaving his wife outside in the car. When he and David and David's wife came out of the house Mrs. King in a temper called out: "Go "indoors you dirty adulterers." That was a horrible thing to say, especially in the public street, but Mrs. King is not a woman of refinement and she had reason to be incensed. I have dwelt on David's marriage at some length because the marriage and the continued social meetings between Mr. King and David's wife had certainly a great effect on Mrs. King's mind and I think also on her health. No doubt she behaved badly, but her husband behaved with great want of consideration, and the charge of bringing on abortion was as cruel a charge as a husband can bring against his wife. The trial judge mistakenly thought that the appellant had denied having made this charge, and it is a serious flaw in the judgment.

I must mention briefly the wife's finding of a woman's glove in her husband's car in March, and the incident of the contraceptives found by his wife in his wallet in March or May, 1949. These two incidents are of some importance in relation to the wife's conduct, for it is after them and after the time when she said that her husband was a member of a dirty family that her complaints of his misconduct with other women became frequent and even, as the husband deponed, almost continuous. In January, 1950, the husband told his wife that he would have an operation so that he could no longer have intercourse with women. Then there was the finding by the wife of a woman's comb in her husband's luggage in February, 1950. All these incidents and the discovery of the husband's handkerchiefs befouled with seminal stains were explained by the husband, and his explanations were no doubt accepted by the trial judge. But he never considered the effect of such incidents on the wife's attitude and conduct. Nor did he make any allowance for the fact that she was pregnant when she brought the period of tranquillity to an end by threatening to go to Switzerland and to remove her child from the contamination of her husband. It was while she was pregnant that her husband, in a temper provoked by her accusations, flung his supper on the floor, and on another occasion broke a chair.

I do not think that it is necessary to review the last dreary stage of the quarrels and complaints which followed the last time when sexual intercourse took place, on April 8, 1950. By then the marriage had been shattered and had gone to ruin. The husband for some time before that had been again trying to persuade his wife to bring an action of divorce, the wife was consulting solicitors, and they were having the husband watched.

It is plain that, after the period of tranquillity ended, the husband's conduct was not a whit better than the wife's. They were both blameworthy and each was guilty of behaviour which, considered without reference to the behaviour of the other, might be regarded as cruel. Barnard J. says that there came a time near the end of the consortium when Mrs. King enjoyed hurting her husband. I cannot find in the recorded evidence any support for this finding, and it is a finding essentially different from a finding that the wife had pursued a course of conduct deliberately intended to hurt her husband. When a husband and wife have reached the stage of unending accusations and recriminations, the wife's satisfaction in inflicting pain may be the reflex of the bitterness and pain suffered by her, and it is especially likely to occur when there had been formerly real affection and a strong bond of physical attraction between the parties.

The injury to Mr. King's health was not serious, and it can as readily be attributed to the breakdown of the marriage brought about by the conduct of both parties as to the cruelty of the wife.

In my opinion the appellant failed to prove conduct amounting to cruelty and the appeal should be dismissed.

Lord Oaksey. My Lords, I agree with Somervell L.J. that this is not a case in which the judgment of Barnard J., who saw and heard the witnesses, ought to have been reversed, and I am therefore of opinion that this appeal ought to be allowed.

Divorce petitions on the ground of cruelty are, as has been said, cases in which it is especially important that the findings of the judge should not be interfered with. In the present case it is, in my opinion, clear that Barnard J. treated the case from the outset as one in which the petitioner had an exceptionally heavy onus to discharge in view of his admission of adultery, of his wife's forgiveness and of the other unusual circumstances of the case. But he came to the conclusion, after hearing all the evidence, that the husband was telling the truth and that the wife was not and that a case of cruelty had been made out. The majority of the judges in the Court of Appeal, however, held that the judge had misdirected himself when, adopting the words of Bucknill J. in *Horton* v. *Horton*,[23] he said that the petitioner must prove that his wife had "committed wilful and unjustifiable "acts inflicting pain and misery upon him and causing him injury "to health."

In the first place it is to be observed that the respondent's notice of appeal to the Court of Appeal did not complain of any misdirection but merely that the judgment was against the weight of the evidence. In my opinion, there was no misdirection. This is not a libel action in which the word "justification" has the

[23] [1940] P. 187, 193.

sense that the words justified must be proved to be true. What the judge spoke of was the wife's conduct, and, in my opinion, it was not a misdirection when he said: "These are serious charges "and the husband has got to establish them, and I am quite "satisfied that he has established them, that the wife's conduct "towards him was wilful and unjustifiable: that it did cause him "pain and misery and that it was that conduct on the part of "the wife which led to the injury to his health in May, 1950, "when he finally left the matrimonial home. Therefore I am "satisfied that the husband has established his case of cruelty." In this connexion it is important to observe, as Somervell L.J. did, that at the trial the respondent's case was not that her accusations were justified but that she had not made any such accusations. For instance she was asked: "Did you ever accuse "him of having been out with another woman?" Answer: "No." "Did you ever yourself accuse him of going out with "other women?" Answer: "No." "As the reason for his "being late?" Answer: "No."

Apart from the suggested misdirection there is, in my view, no sufficient ground for reversing the judge's finding. It is said that the judge made a mistake on one matter and left out other matters. It is true that the judge was in error in stating that the appellant had not accused his wife of bringing about her abortion in October, 1949. The judge said: "I do not think he ever said "to his wife, in fact I am sure he did not, but he did admit "that he thought, that the wife had deliberately brought about "a miscarriage." In this statement the judge was in error. It appears from the evidence that in the course of a quarrel each party accused the other of causing the abortion but that the appellant made the first accusation. The wife's evidence on this matter in examination-in-chief was: "You remember he accused "you in the February of 1950 of having brought about a mis-"carriage—you remember that?" "Yes." "Was he, after "you showed distress, nice to you for some time after that?" "Oh, yes. He took me in his arms and said he was sorry."

In view of this evidence it seems to me improper to attach too much importance to this, the judge's only mistake in a long and difficult case. Similarly, I cannot attach importance to the fact that the judge did not specifically refer to the finding of Mrs. Rose's gloves in the appellant's car in March, 1949, or the finding of a woman's comb in his pocket in February, 1950. I do not think it any part of my duty to examine every fact found by the judge and put my interpretation upon it.

If there was sufficient evidence by the appellant husband to establish a case of cruelty, and the husband is believed and the wife is disbelieved, I cannot think it is right for a Court of Appeal to accept his evidence in part and accept the wife's evidence in part and form its own conclusions of fact. But that is what the majority in the Court of Appeal appear to me to have done in this case.

In the Court of Appeal Denning L.J., who gave the leading judgment and dealt with all the facts, appears to me, whilst doubtless intending to accept the judge's findings, to have mis-stated them. For instance, after reciting events which happened from February, 1949, to August, 1949, the Lord Justice said: "On the top of all these things the woman, Mrs. Rose, with "whom the husband had committed adultery, was being taken "into the King family." As a matter of fact the respondent was informed that the petitioner's brother, David, had become engaged to Mrs. Rose in March, 1949, and the respondent did not suggest that she had complained in any way of the engagement. Denning L.J. proceeded to say: "To make things worse, in "September the husband's brother married Mrs. Rose." As it was common ground that the wife knew of the engagement and presumably of the forthcoming marriage, it appears to me that this was not a fair statement of the facts. Mrs. Rose's engagement to the petitioner's brother David created a position of much difficulty, but there is nothing to suggest that it was the petitioner's fault, nor is there any evidence that he ever saw Mrs. Rose again alone.

The petitioner came back to his wife on February 25, 1949, having admitted his adultery with Mrs. Rose, but as his wife knew he only came back because she refused to divorce him and threatened to commit suicide if he did not. Her conduct in forgiving him and taking him back as her husband was doubtless commendable. But when she heard in March, 1949, of his brother's engagement to Mrs. Rose she knew that Mrs. Rose was coming into the family. If she had felt that such a state of affairs made her life intolerable, surely it was her duty to say so. But she did nothing of the sort. In my opinion, the wife's conduct after what has been called the most tranquil part of their lives from March, 1949, to August, 1949, in saying that she was going to take the baby of which she had become pregnant in July, 1949, away to Switzerland so that the child should never be seen by the petitioner and not contaminated by a very dirty father, was a most cruel and terrible threat to make and one which she never withdrew. It is said that she was pregnant and that much must be forgiven of pregnant women. No doubt this is true, but such considerations are, in my opinion, for the judge at the trial to weigh up and it is not for a Court of Appeal to review in detail and come to different conclusions on the findings of the judge who saw the witnesses.

The petitioner's case was that his wife accused him from the earliest days of their marriage of undue familiarity and adultery with other women, that she would take no steps to investigate his explanations, that she threatened to take his unborn child away to Switzerland so that it should not be contaminated by him, and that she nagged at him until his life became intolerable and his health gave way. The respondent's case was primarily a denial of the petitioner's evidence. The judge who saw the witnesses believed the appellant, and in such circumstances I think his judgment should not have been reversed.

LORD REID. My Lords, in this case the husband, the appellant, alleges that his wife, the respondent, has treated him with cruelty, and the question is whether the court should be satisfied on the evidence that his case has been proved. Barnard J. so held and I accept without question his assessment of the witnesses. He found that the wife was a most unsatisfactory witness, and where the husband and wife were in conflict he entirely accepted the husband's evidence and not that of the wife. There was no other really material evidence, so the question is whether the husband's evidence is sufficient to prove his case. No difficulty arises as to injury to his health: that is proved. And I have no doubt that the wife's conduct in making nagging accusations against her husband was such that in some cases it could be held to amount to cruelty. The real difficulty is to decide whether in the circumstances of this case it was cruelty.

Barnard J. dealt with this matter by applying as the test a quotation from the judgment of Bucknill J. in *Horton* v. *Horton*[24]: "He must prove that she has committed wilful and "unjustifiable acts inflicting pain and misery upon him and "causing him injury to health." Bucknill J. took the phrase "wilful and unjustifiable acts" from the speech of Lord Herschell in *Russell* v. *Russell*.[25] I do not think that Lord Herschell intended that that phrase should be for universal application.

[24] [1940] P. 187, 193.

[25] [1897] A.C. 395, 445.

Lord Reid.

What he said was that there might be many wilful and unjustifiable acts, inflicting pain and misery, in respect of which relief could not be obtained. In *Russell* v. *Russell*[26] the wife's accusation that the husband had been guilty of an unnatural offence had been proved to be untrue, but she persisted in it and it was held that she did so without any belief in its truth. So her conduct was not only wilful but malicious. But it did not injure or endanger the husband's health. For the husband "Sir Robert "Reid's proposition was that cruelty is such wilful infliction of "bodily or mental pain as is calculated to render matrimonial "relations unendurable" (*per* Lord Davey[27]), but this House held by a majority that that was not sufficient in the absence of injury or danger to the husband's health. In that case the phrase "wilful and unjustifiable acts" was appropriate and I think that it was not inappropriate in *Horton* v. *Horton*,[28] because in that case Bucknill J. said with regard to the wife's charges: "If made "out they show a malevolence which is likely to bear fruit in acts "of cruelty—an evil, unwifely spirit—far more serious to my "mind than mere nagging and possessiveness and jealousy."

But in a case like the present the phrase "wilful and unjustifiable acts" can, in my opinion, lead to misunderstanding or error. One, and perhaps the most natural, interpretation of it would be that, once the husband has proved conduct which, taken in isolation, would be cruelty, it is for the wife to justify that conduct; no doubt she could justify it by proving something which could reasonably raise a suspicion in her mind, but it would hardly seem relevant on that view to consider blameworthy or inconsiderate conduct of the husband of a kind which bore no relation to the wife's charges. Barnard J. does not explain in what sense he used the phrase. I hope that I am not doing the judge any injustice, but my impression is that he used it in some such sense as I have just stated, because he has omitted to deal with some matters which would be irrelevant on this view and dealt with others in a manner entirely appropriate if this view is correct, but not, I think, if it is proper to take a wider view.

In my judgment in a case of this character the wife's conduct must be judged in light of the whole history of the marriage. I would refer to *Thomas* v. *Thomas*.[29] The Law Reports only give excerpts from the speeches in this House, but there is a full report in Session Cases. Briefly stated, the important facts were that the husband became friendly with Margaret Stewart, an employee of his, and his wife deeply resented this friendship. Her jealousy was such that she lost control of herself and of her tongue. He retired into sulky silence. Then the employee left, but that did not improve matters and during the next two months or so there were incidents, including an assault by the wife. Then the husband left and later raised an action of divorce for cruelty. The Lord Ordinary, Lord Patrick, said in a passage quoted by Lord Simonds[30]: "She had said and written bitter and unjustified "things to and of him. His inconsiderate and foolish behaviour "brought a highly strung and nervous woman to a state in which "she could no longer command her thoughts and speech. If he "had displayed to her the consideration and restraint which the "marriage state demands, he would, I think, have evoked a "similar consideration and restraint from her." Commenting on these words Lord Simonds said[31]: "There is in them the clear "recognition, which I find elsewhere in the judgment of the Lord "Ordinary, of the fact that the picture of the domestic lives of "this man and woman must be surveyed as a whole, before a "true judgment can be formed of their possible future relations." Lord Thankerton said[32]: "I desire to add that, having in view "the opinion formed by the Lord Ordinary of the evidence, I am "of opinion that he was justified in his strictures on the conduct "of the respondent towards the appellant, for he neglected the "duty of mutual forbearance and help when she was in a nervous "and irritable condition, which his merely negative attitude was "calculated to enhance. For the same reason, his persistent "attitude as to Margaret Stewart was inexcusable, and the "departure of the latter in July, 1940, could not be expected to "remove from the appellant's mind and outlook the unfortunate "results of that attitude." Lord du Parcq said[33]: "The assault "must be viewed, not as an isolated fact, but in its setting, as "an incident in a complicated series of marital relations. The "intent and the mental condition of the spouse against whom "cruelty is alleged are always important considerations. . . . "The fact that the defender was suffering from a form of ill-"health likely to affect her conduct is not to be regarded as "telling against her. I would not suggest that illness ought to "be accepted as an excuse for cruelty, but when it is necessary

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[26] [1897] A.C. 395.

[27] Ibid. 468.

[28] [1940] P. 187, 190.

[29] [1947] A.C. 484; 1947 S.C. (H.L.) 45; 176 L.T. 498.

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[30] 1947 S.C.(H.L.) 60; 176 L.T. 505–6.

[31] 1947 S.C.(H.L.) 61; 176 L.T. 506.

[32] 1947 S.C.(H.L.) 57; 176 L.T. 504.

[33] 1947 S.C.(H.L.) 63; 176 L.T. 507.

"to appreciate the quality of an act or a course of conduct, as "it is when the grave accusation of saevitia is made, the law "does not forbid a judge to have regard to any physical or mental "strain under which the accused spouse was labouring." Viscount Simon dissented, partly, I think, because he took a somewhat different view of the law. He said [34]: "It is deplorable that "this degree of mutual friction and discord should have existed "between them, but I cannot regard the behaviour of the husband "in this case as having 'provoked' the assault of September 7 "in any relevant sense—in the sense in which a husband's short-"comings in relation to his wife may sometimes disentitle him to "a decree for adultery or desertion. Neither can the husband's "right to a decree for cruelty be denied on the ground of the "wife's pathological condition which was producing increased "nervous irritability." What was said by the majority in *Thomas* v. *Thomas* [35] may not be novel though it may make necessary a re-examination of the reasoning in *Squire* v. *Squire*.[36] But it does, in my opinion, show that it is not right first to ask whether the respondent's conduct was cruel in fact and then to ask whether it can in any way be justified. The question whether the respondent treated her husband with cruelty is a single question only to be answered after all the facts have been taken into account. With that in mind I must proceed to examine, as briefly as I can, the facts of this case.

The parties were married in June, 1946, shortly after the husband had been demobilized. The wife was Swiss and a Roman Catholic. They had been engaged before the war, and during the war she was in Switzerland with her mother, who had a hotel or restaurant there. The evidence shows that there were at least three features in the wife's character which contributed to the unhappiness of their married life. She was extremely jealous; she was apt to jump to conclusions; and when she had a real or fancied grievance she often bottled it up for a time instead of taxing her husband with it. That is well illustrated by the first serious incident in the case. At the end of 1946 they went to a dance. About halfway through the dance the husband saw that she was very upset about something. She would not say what it was and refused to speak to him for a day or two. When pressed she charged him with very improper behaviour on the dance floor with a Mrs. Breden, and would not accept his denials. What she alleged was highly improbable and quite untrue, but no doubt she saw, or thought she saw, something and then misinterpreted it. The husband had come back to a family business nearly bankrupt and he had to work long hours, and she began to accuse him of seeing Mrs. Breden. After a time these accusations plainly implied adultery, and they were made two or three times a month. She would neither accept his denials nor take opportunities to see for herself whether there was any foundation for her charges. She went to Switzerland to stay with her mother in the summer of 1947, but he could not go because he was too busy. On her return, things went on much as before, though other women were brought in as well as Mrs. Breden. I do not think it necessary to examine this period in detail. But there is one other matter I should mention. The wife made a proposal that she should go back and enter the hotel business in Switzerland with her mother, and that the husband should come to see her when he could. The husband was very disturbed by this, but nothing came of it. I think that his case is based more on her accusations against him. In my judgment, throughout this period the husband was not to blame but the wife was. The position was becoming serious but as yet I do not think that the wife's conduct had reached that degree of intensity and persistence necessary before cruelty could be established. When she went to Switzerland for the second time in August, 1948, her leave-taking was so cold that her husband did not expect her to return. But he wanted her to return to him.

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[34] 1947 S.C.(H.L.) 53; 176 L.T. 501.

[35] 1947 S.C.(H.L.) 45; 176 L.T. 498.

[36] [1949] P. 51.

In September, while the wife was in Switzerland, the husband went for a holiday and met a Mrs. Rose whom he had known before and who had obtained a divorce. There had previously been no improper relations but during this holiday he committed adultery with her and he soon decided that he wanted to marry her. So he wrote a letter to his wife to induce her to stay in Switzerland. But almost at once on receipt of the letter she came home. This was in November. He then confessed his adultery and asked her to divorce him. She refused. She wanted him to return to her, but for a time he stayed with his mother. Ultimately he realized that it would be impossible to marry Mrs. Rose; the last occasion when they committed adultery was in January, 1949, and in February he returned to his wife.

From February until August, 1949, both parties made a real effort to re-establish the marriage. Contraceptives had been used previously, but they now decided to try to have a child, and the wife became pregnant about July. There were three things which occurred during this period but had no immediate influence. In March Mrs. Rose became engaged to the husband's brother, who was his partner in business. About that time the respondent discovered a pair of women's gloves in the car. And some time before May she found contraceptives in her husband's wallet, and looking again some time later she found that one had gone. She did not mention these two matters at the time, but I do not think that she is to be blamed for that. I have said that her tendency to bottle up grievances was unfortunate, but on this occasion she might well think that to bring up these matters would endanger the better relations then prevailing.

In August there was a quarrel. He said that it was about money and that she seemed to pick a deliberate quarrel. I do not consider her evidence, which may well be untrue, but I have some difficulty in understanding the matter on his evidence alone. It may, however, have some connexion with what she said a few days later. She said she was going back to Switzerland and was taking the child away so that it would not be contaminated by a very dirty father and that he was a member of a very dirty family because his brother was marrying Mrs. Rose. The husband brought in a clergyman to effect a reconciliation, and she told him about the gloves and the contraceptives. It was found that the brother had borrowed the car and the gloves were those of Mrs. Rose. As to the contraceptives the husband said that they had simply remained in his wallet from the time before the previous August when he and his wife were using them. He admitted the disappearance of one: he said that, looking for something else one day in his wallet, he noticed that a small key which he carried had punctured one of them and that he took it out and threw it away. He does not appear to have said why, when his attention was drawn to them, he did not throw the other away too, seeing that he had no use for it.

I follow Barnard J. in accepting his story as true but, when one remembers that the husband did not return to his wife after his adultery because he was repentant and wanted to return but only because he thought there was no other course open to him; I do not think that the wife could be blamed overmuch for doubting the husband's story.

During the pregnancy they slept apart for a time and she discovered some stained handkerchiefs. He admits that there were more than one but I do not think there were many. She accused him of masturbation and he hotly denied it and told her to see a doctor, who would explain. On one occasion when the matter was mentioned he lost his temper and broke the leg of a chair, and he lost his temper on one other occasion about this time. I do not think he was much to blame because by this time her accusations were almost continuous and his nerves were on edge, but nevertheless I think that one must recognize that these were matters which might well disturb the mind of a pregnant woman.

The wedding of the brother and Mrs. Rose was towards the end of September. The husband went and did not get back until about seven o'clock. As ill luck would have it, the wife became ill while he was away and had to go out in the rain to telephone for a doctor, and this was the beginning of an illness which led to a miscarriage. The next incident of importance occurred in December. The husband had a turkey to deliver at his brother's house and his wife insisted on going with him in the car. Instead of just leaving the turkey and coming away, he went into the house leaving his wife in the car. He did not stay very long but he came out accompanied by his brother and his former mistress, now his sister-in-law. The wife lost her temper and shouted out something about dirty adulterers. Later he asked her to apologize but she would not. He says that he consulted the clergyman who had been called in before and was advised that she must apologize. He agreed in cross-examination that he regarded this incident as of enormous importance.

By this time the wife was quite unreasonable. There was one occasion when, at the husband's shop, she made accusations which could have been immediately proved or disproved, but when asked to see for herself she just went away. Then there was one final short period in January, 1950, when things were better. The husband had visited a friend and found that his wife was dying though she did not know it, and he was so affected that, as he said, he made a final effort to make it up with his own wife. But his own nervous condition was too much for him. He said that he was so sick of the whole business of sex that on one occasion he said to his wife that he was going to have an operation so that he could have no more intercourse. Barnard J. said he was driven to this, and I would not dispute that. But there was another incident which it is not so easy to dismiss. In February he accused her of having taken something to get rid of the baby. Owing to the learned judge having misapprehended the evidence about this—the only occasion in a long judgment on which I think that he was inaccurate about an important fact—we do not have the advantage of his opinion about it. But it is clear that it was not just a wild charge made on the spur of the moment because when asked in cross-examination: "Were you accusing her of something which you "believed to be true?" he answered: "Yes." It is true that he was sorry as soon as he had said it and did his best to make amends by consoling his wife and also she made counter-accusations in reply, but still the charge must have had its effect, and he had absolutely no grounds for making it.

Then there was another unfortunate incident. The husband on a trip to Leeds forgot to pack his brushes and comb. He went out to buy a comb and could only get a woman's comb, and this was in his bag when he came back. He told his wife this when she asked him about it and she said: "You have got "one in your pocket all the time." To his surprise he found she was right: indeed she produced it from his pocket so quickly that he wondered if she had put it there. He often carried a comb, but he says that it did not occur to him to look in his pocket in Leeds, and looking to his mental state at the time that could well be true. But it must have seemed strange to the wife.

Both parties had long before this consulted solicitors, and the wife kept threatening him with legal proceedings but would never say for what. He again brought up the subject of a divorce but she would not have it. His worry turned to something like despair, and early in March he collapsed in the house and was found by his wife. In April there was a last unsuccessful attempt at intercourse. Again he complained of her accusations and put it to her that it was impossible to have a row about this all evening and expect to have intercourse later. In reply she struck a blow.

I do not think I need describe the last stages before he left her in May. Neither party was normal. There was a scuffle one night at the end of April when he came back from a wedding at 11 o'clock: he had not even gone to the wedding reception but had been working. And there was another incident the next night when he came back at about half-past ten. Some days later he left her.

There is one part of the judgment of Barnard J. which requires separate notice. One reason given by the wife for her delays in making her complaints known to her husband was that she did not want to hurt him. In rejecting this evidence Barnard J. said: "I come to the conclusion that it was one of the things "that I think certainly towards the end she enjoyed more than "anything else, and that is hurting him." It has long been recognized that a malevolent intention while not essential to cruelty is a most important element where it exists. For example, Bucknill J. dealt with this in the passage which I have quoted from his judgment in *Horton* v. *Horton*.[37] Barnard J. followed that judgment in this case. So if he intended to find that this wife had a malevolent intention and deliberately set out to hurt her husband he must have recognized the importance of that finding, and I do not think that he would have brought it in merely as a comment on part of her evidence. Moreover, counsel were unable to refer to anything in the printed evidence to support such a finding. No doubt malevolence can be inferred from a witness's demeanour, but when a witness has given evidence at great length one would expect to see some trace of it in what she says: and one might also expect something in the husband's evidence. So I must conclude that Barnard J. did not intend to make such a finding but rather meant that when in the heat of a quarrel she derived some satisfaction from hurting her husband. Looking to her state of mind towards the end that is not surprising.

In considering whether the husband has proved his case I think that the vital period is that between the wife's return from Switzerland in November, 1948, and the last stages in the spring of 1950, and one must start with the facts that at the beginning of that period the husband was committing adultery and was urging his wife to divorce him. I think that those facts had a continuing influence and must be kept in mind in dealing with the subsequent events. The part of the case which has given me most difficulty is the picking of a quarrel by the wife in August, 1949, her threat to take her unborn child to Switzerland and her subsequent conduct. But I cannot dissociate those events from the marriage of Mrs. Rose to the husband's brother or from the series of incidents where in some cases, although the husband was innocent, appearances were against him, and in other cases the husband was to say the least inconsiderate. I have said that I think that Barnard J. applied too narrow a test. I think that he did so when he said of the marriage of Mrs. Rose "in some ways that was a good thing, it meant that Mrs. Rose "was satisfactorily disposed of." That might be a proper comment if one were merely considering what justification there was for the wife's continuing charges of adultery, because it could hardly be supposed that the husband would commit adultery with Mrs. Rose after she became his sister-in-law. But, if one looks at the case more broadly, far from Mrs. Rose being satisfactorily disposed of she was not disposed of at all. She was there as the wife of the husband's brother and partner and the effect of that is illustrated by the turkey incident. No doubt this marriage was not the husband's fault. But if a husband commits adultery and is unrepentant he can hardly complain if later developments make it harder for his wife to put that out of her mind and aggravate an already difficult situation.

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[37] [1940] P. 187, 193.

I do not intend to try to define cruelty. I doubt whether any definition would apply equally well to cases where there has been physical violence and to cases of nagging, or to cases where there has been a deliberate intention to hurt and to cases where temperament and unfortunate circumstances have caused much of the trouble. But in cases like the present, the wife's conduct must at least be inexcusable after taking everything into consideration. To my mind, this case is narrow and difficult, but in all the circumstances I am unable to hold that this wife treated her husband with cruelty and I am therefore of opinion that the appeal should be dismissed.

LORD ASQUITH OF BISHOPSTONE. My Lords, unfortunately I find myself unable to concur with the opinions of the majority of your Lordships: from which I dissent, I need hardly say, with appropriate diffidence, though fortified by agreement with the opinion expressed by my noble and learned friend Lord Oaksey.

In substance the husband's petition is based on "cruelty"; on cruelty consisting of what is called "nagging" by the wife. The nagging is alleged to have taken the not unusual form of constantly reiterated and (except in one case) false charges of adultery. There are two allegations against the wife of physical violence, but these are unimportant except in so far as they may operate in law to revive, after a period of condonation, the effect of acts of the wife done before that period. In a matrimonial offence such as cruelty where often the cumulative effect of a chain of acts is in question, such revivor, by lengthening the chain, is often important.

It is accepted that where cruelty is alleged the petitioner must prove two things: (1) That the acts were cruel; (2) that they damaged the petitioner's health. If in the present case the acts were cruel, there was ample evidence on which the trial judge could find, as he did, that they damaged the husband's health. The real issue was whether the acts complained of were sufficient to constitute cruelty or not.

It is true that generally speaking a man marries at his peril as to the character his wife may disclose. She may develop on quite unexpected lines. She may prove, contrary to all rational expectation, touchy, perverse, cross-grained and temperamental. She may make wild unfounded charges against him, and he may, in the circumstances, have no remedy. But it does not follow from this that the indefinite repetition of false charges, however frequent the repetition and however wounding the charges, may not reach a point at which it passes into the realm of cruelty affording a ground for divorce. Indeed, it has often been held to do so.

The test which has commonly been accepted for determining whether this point has been reached is that laid down by Bucknill J. in *Horton* v. *Horton.*[38] The material passage has been repeatedly cited by my noble and learned friends, and I will not again repeat it, but merely observe that the word "unjustifiable"—the key word in the formula—is left undefined. What does it mean? One thing is plain: "unjustifiable" cannot, in this context, mean simply "untrue." What has to be "unjustifiable" is not the charges themselves but the "acts" of the spouse in making them: and a spouse's conduct in making charges may be perfectly justifiable notwithstanding that the charges are, as it happens, untrue. Human beings can do no more than act according to their lights. Such data as the wife has (I will for brevity speak of the accuser as "the wife" because she happens to be the accuser in this case, but needless to say the same applies where the accuser is the husband) may point almost irresistibly to the guilt of the accused, although he is in fact innocent. Few would defend Othello's act in killing Desdemona. But was his conduct "unjustifiable" in any sense relevant to cruelty in believing and preferring the charges he did, however unjustified the charges themselves were in fact and in truth?

Nor do I consider this factor—the presence or absence of plausible data—though it may well be an ingredient in "justifiability," exhausts the content of that expression. It is, in my view, proper to include within its ambit the general circumstances, so far as relevant, in which the accusing wife was placed. These vary infinitely with the facts of individual cases, but must

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[38] [1940] P. 187, 193.

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necessarily include any conduct on the part of the husband which was calculated to afford provocation or excuse for charges in fact untrue which in its absence would have been "unjustifiable." In the other scale it is proper to have regard to conduct on the part of the wife which is not the mere result of provocation, or of a mere desire to relieve her feelings by some explosion of temper or temperament. The "flash and outbreak of a fiery "mind" is one thing, conduct which is designed to hurt the husband for the sake of hurting him is another.

I am not, in this connexion, forgetting the case of *Squire* v. *Squire*,[39] in which the Court of Appeal held that a deliberate intention to hurt is not an indispensable concomitant of cruelty, a person being in this field among others presumed to intend the natural consequences of his or her acts.

Subject to the meaning of the word "justifiable" or "un-"justifiable," which is in part a question of legal construction, the questions involved in such a case as the present are almost wholly questions of degree. What was the intensity and frequency of the acts complained of? Was their intention to hurt for hurting's sake? Did the victim, through provocative conduct in part, and if so how far, invite the nemesis of which he complains? These are, in my view, provided the judge has directed himself accurately on the meaning of "justifiable," questions of pure fact, as questions of degree generally are.

As to one fact there can be no argument. The husband, during the wife's absence in Switzerland in 1948, did commit adultery on four occasions with a woman called Mrs. Rose. This he frankly admitted to her on her return—I mean the adultery though not perhaps the identity of his partner—and it is clear that at this time he wished to be released from his existing marriage and to marry Mrs. Rose.

And there is another circumstance which is beyond dispute, and important when we are in the realm of facts. The experienced judge who tried this case for five days heard and saw the husband and wife in the witness box. He deliberately affirms, basing himself largely but not wholly on demeanour, that on every contested question of fact he accepts the testimony of the husband and rejects that of the wife. I must add that even in cold print her evidence seems to me, as it did to the learned judge, in many respects flagrantly evasive, in others flatly incredible. But apart from that, this House has emphasized, in

[39] [1949] P. 51.

Thomas v. *Thomas*,[40] that there are no cases in which the demeanour of the witnesses as assessed by the trial judge is more important than cases of cruelty. The learned judge had no doubts about the relative credibility of the parties.

The married life of these parties fell into three chronological sections: (1) from June, 1946 (the time of the marriage), till June, 1947, when the wife went for some considerable time to Switzerland; (2) from her return from Switzerland at the end of August, 1947, to her second visit to Switzerland in 1948 (August to November); (3) from her return in November, 1948, till May 12, 1950, when the husband parted from the wife.

The wife alleges that apart from Mrs. Rose—adultery with whom he admitted—she never on any single occasion accused him of adultery at all. If we accept the judge's findings of fact, this is wholly untrue. Her story is not: "You gave me reasonable cause for suspicion or accusations—and appearances justified me in making them!" It is, except quoad Mrs. Rose: "I never made any accusations of adultery at all."

Of course, the fact that the wife lied is not conclusive. But once the judge has directed himself properly in law, the questions, in cruelty, are, as I have already suggested, questions of the intensity and degree of the conduct of the wife, due allowance being made for the intensity and degree of any provocation offered by the husband, and for all other relevant circumstances. At the risk of repetition I would again emphasize that these are pure questions of fact; questions on which the demeanour of the parties in the witness box is, as I have said, highly important, and often decisive: and questions on which it is for the judge to measure the weight of the wife's conduct, the weight of the provocation and that of the other circumstances. If the first—the wife's conduct—is assessed by him as wholly out of proportion to the second, and to any other relevant circumstances which might extenuate it, and he proceeds to find cruelty established, his finding should, in my view, not be lightly disturbed. If he is not mistaken in law as to the nature of the calculation he has to make, it is peculiarly within his province to estimate the weight of the factors necessary to work out the sum.

The judge has asked himself the right question and is guilty of no misdirection. In the field of fact there is one legitimate criticism of his judgment. The husband, on his own admission,

[40] [1947] A.C. 484; 1947 S.C.(H.L.) 45.

had, in the third period, accused the wife of inducing in herself an abortion. The judge finds that the husband suspected this but gave no voice to his suspicion. This was an undeniable error. The husband said he did make the charge, though he adds that in doing so he acted on information, and that he is not certain she did not first make it against him.

The other criticisms of the learned judge's judgment seem to me ill-founded. It is said that he nowhere mentions three incidents (which the wife could have prayed in aid as provocative of her suspicions and her accusations) in relation: (1) to contraceptives found in some wallet of his; (2) to a woman's comb found in his pocket; (3) to a pair of gloves (belonging to Mrs. Rose) found in his car. On all these issues the judge accepts the husband's explanations, but the point is not so much whether these were true, as whether the appearances were such as to excite so much suspicion as to "justify" the wife's conduct. It is true that the judge in an extemporary judgment of inevitably considerable length makes no express mention of these episodes, but I am quite satisfied he did not overlook them. He joined in cross-examining the wife on some of them and, as a matter of psychological fact, I can testify that a judge rarely forgets a point in respect of which (acting selectively) he has descended into the arena and engaged in interrogations on his own account.

Finding, as he did, for the husband on all issues fact on which his evidence differed from the wife's, I have no doubt that the judge was a good deal influenced by what he found to be the reiterated and baseless charges of adultery with Mrs. Breden in Period I; on the reiterated charges of adultery in Period II; and in Period III (after a few months of attempted reconciliation) incessant charges of the same tenor; and also by the wife's reluctance to put her accusations to the test when she could have done so and was invited to do so; together with his strong impression, no doubt inspired partly by her demeanour in the box, that she wanted to hurt her husband for hurting's sake; that latterly she enjoyed nothing so much.

On the whole, while I think the learned judge's judgment not above criticism—what judgment is?—I am of opinion that he did not misdirect himself in law, and that the questions remaining were questions of fact and degree on which he had to make findings to size up and weigh against each other the various relevant factors. Having seen and heard the witnesses, he enjoyed in this task so great an advantage over any appellate tribunal that his findings should, in my view, stand. In these circumstances I agree with my noble friend, Lord Oaksey, and feel bound to record my respectful dissent from those members of your Lordships' House who constitute the majority and whose views must accordingly prevail.

Appeal dismissed.

Solicitors: *Bird & Bird; Scadding & Bodkin.*

J. C.*
1952
Oct. 6.

SEEREELALL JHUGGROO . . . . APPELLANT;

AND

CENTRAL ARBITRATION AND CONTROL BOARD AND ANOTHER . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF MAURITIUS.

Mauritius—Sugar industry—Extraction—Payment to planters—Jurisdiction of Arbitration and Control Board—Certiorari and mandamus—Sale of Canes (Control) Ordinance, No. 47 *of* 1941, *ss.* 6 (1) (2), 15, 21.

Section 6 (2) of the Sale of Canes (Control) Ordinance, 1941, of Mauritius, provides that the Central Arbitration and Control Board, set up under the Ordinance, "When determining the payment due to planters in return for their canes . . . shall be guided by the principle that the average amount of sugar which planters might expect to receive for their canes would be not less than two-thirds of the amount of sugar which a ton of such canes delivered at the factory may normally be expected to yield"; and by section 6 (1) the decision of the board on any dispute referred to it for settlement shall be conclusive and binding on the parties:—

Held, that section 6 (2) must be read having regard to the relevant attendant circumstances and in the light of the Ordinance as a whole, and that in making a determination under the subsection the board is not restricted to giving a planter not less than the two-thirds proportion therein referred to, but is entitled to take into account the cost incurred by the respective parties—planter and miller—on the one hand of producing the canes, and on the other of dealing with them at the mill and of manufacturing, bagging and transporting the sugar. Accordingly, where as the result of the board taking those matters into consideration a planter had in fact received less than the two-thirds specified in the subsection, the board had not exceeded its jurisdiction, and the resultant decision being for the board and it only, certiorari and mandamus would not lie.

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* *Present:* LORD PORTER, LORD TUCKER, LORD COHEN, THE CHIEF JUSTICE OF CANADA (RT. HON. T. RINFRET) and SIR LIONEL LEACH.

Orders of the Supreme Court of Mauritius affirmed.

Appeal (No. 44 of 1951) from two orders of the Supreme Court of Mauritius (January 24, 1951), refusing applications by the appellant for writs of certiorari and mandamus addressed to the first respondents, the Central Arbitration and Control Board, set up under section 3 of the Sale of Canes (Control) Ordinance, No. 47 of 1941, of Mauritius.

The following introductory statement is taken from the judgment of the Judicial Committee:—The facts giving rise to the application were not in dispute; they were set out in a judgment of the Acting Chief Justice given on November 13, 1950, from which they have been taken.

Under section 3 of Ordinance No. 47 of 1941 the Governor could appoint a Central Board which should be charged with such duties of control and arbitration as were set out in the Ordinance. Under section 4 (1) the chairman should convene the board whenever a dispute was referred to it by a regional committee, or whenever, in his opinion, the matter was one of urgency, or was one which concerned the sugar industry as a whole. Under section 6 (1) the decision of the board on any dispute "submitted "or referred to it for settlement . . . shall be conclusive and "binding on the parties and the persons claiming under them."

Section 6 (2), on which, it was said, the decision of this matter largely turned, enacted that: "When determining the payment "due to planters in return for their canes the board shall be "guided by the principle that the average amount of sugar which "planters might expect to receive for their canes would be not "less than two-thirds of the amount of sugar which a ton of "such canes delivered at the factory may normally be expected "to yield."

By section 8 (1), subject to the provisions of subsection (1) of section 4 of the Ordinance, in all disputes between planters and millers relating to the amount, basis and method of paying for canes purchased by millers from planters, any party to the dispute might refer it to the proper regional committee, who should endeavour to bring the parties to the dispute to an agreement; and, by section 9, any dispute which a regional committee was unable to settle within 14 days should forthwith be referred to the board by the chairman of the regional committee.

By section 15 every planter who sold his canes direct to a factory should enter into a contract with the miller to whom the canes were sold in the form prescribed for the purpose in Sch. II, which form might not be varied without the consent of the chairman of the board. The form of contract set out in Sch. II to the Ordinance provided, inter alia, for the cost of weighing the canes being borne by the miller, and for terms to be agreed respecting the loading and transporting of them to the factory, but contained no provision regarding the cost of production to the planter, nor, save in the case of weighing, regarding the cost of handling, manufacture and packing to the miller. Clause (8) stipulated that the planter should be entitled to receive per ton of canes supplied: (*a*) kilos of sugar to be adjusted on the basis of 98·5° polarization; or (*b*) an amount representing the value of kilos of sugar polarizing at 98·5°; or (*c*) Rupees (prix du cours). Clause (9) of the schedule provided for the checking by the planter or his representative of the weight of the sugar received in payment for canes supplied, and under clause (10) the planter should be entitled to receive per ton of canes supplied and for its delivery at one of the Port Louis Docks kilos of scums and kilos of molasses delivered at the factory within days of delivery of the canes to the miller.

Finally, section 21 of the Ordinance enacted that: "Notwith-"standing anything contained in the foregoing sections whenever "the parties to a contract to be entered into under the provisions "of this Ordinance cannot agree as to the number of kilograms "of sugar and of factory residues, if such are provided for in the "contract, which the party who is to supply canes should receive "in return for the canes supplied by him, such quantity shall be "provisionally fixed in respect of each contract by the appropriate "regional committee, or, if necessary, by the board, and shall as "soon as possible after the termination of the first crop of the "contract be altered or confirmed by the board, and the board's "decision in the matter shall be final and binding upon the "parties to the contract. In such a case a clause shall be "inserted in the contract giving effect to the provisions of this "section."

Those were the relevant provisions of the Ordinance, and the facts which gave rise to this application were not disputed. The applicant, a planter within the factory area of Reunion Sugar Factory, entered, in 1946, into a contract with its owners for five consecutive years under the provisions of section 15 and Sch. II to Ordinance No. 47 of 1941. Early in 1950 the board provisionally fixed the amount of sugar accruing to the planters in the factory area of Reunion Sugar Factory at 85 kilos per ton of canes (being two-thirds of the ascertained extraction) plus 1½ kilos of scums and molasses, and invited objections from interested parties to that provisional assessment. Reunion Ld. objected on certain grounds, the substance of which was: "That the Central Board "failed to exercise the discretion vested in it by section 6 (2) of "Ordinance No. 47 of 1941, inasmuch as it allotted to planters "two-thirds of the calculated extraction without taking into "account all relevant factors, including, inter alia, cost of "production of canes, cost of manufacture of sugar and cost of "bagging and transport of sugar to Port Louis."

As a result of that objection the board sat to decide whether the amount of sugar provisionally allotted to the planters should be maintained or revised. At the hearing counsel for the planters submitted that on the true construction of section 6 (2) of Ordinance No. 47 of 1941 the board had no power to assess the amount of sugar accruing to the planters for their canes at less than two-thirds of the extraction. The board, however, decided that under the subsection it was empowered to assess the amount of sugar accruing to planters for their canes at more or less than two-thirds of the extraction according to the circumstances of each particular case. Having reached that decision, the board proceeded to hold an inquiry for the purpose of ascertaining what was the fair amount of sugar which the planters of Reunion factory area, including the applicant, should receive from Reunion Ld. in respect of the 1949 crop, and ultimately revised the provisional assessment made by it and fixed the amount of sugar to be given to the applicant, amongst others, in respect of the 1949 crop, at 81 kilos, plus 1 kilo for molasses and ½ a kilo for scums.

To that statement of facts it may be added that there were many sugar estates in Mauritius, some large and some small, but the smaller could, if they were minded to do so, join one of two larger groups, have their contracts negotiated by those groups, be represented by them before the board, and obtain a ruling there. Whether they did so or not, the canes of individual planters delivered to the factory were not kept separate or separately dealt with, and the resultant sucrose content was obtained by analysis of the mixed deliveries and not of the canes delivered by an individual planter.

As a result of that revision of the provisional assessment the appellant moved the Supreme Court for the issue of writs of certiorari and mandamus addressed to the Central Board to bring up and quash the decision arrived at and to hear and determine according to law the dispute between the parties.

The Supreme Court (Espitalier-Noel Ag.C.J., Brouard and Neerunjun Ag.JJ.) held that the Central Board had not exceeded its jurisdiction, having regard to the provisions of section 6 (2) of the Ordinance, and that therefore certiorari would not lie.

1952. June 19, 23, 24 and 25. *Pritt Q.C.*, *Ralph Millner* and *H. R. Vaghjee* (of the Mauritius Bar) for the appellant. This is a test case, which really turns in the end on the construction of section 6 (2) of the Ordinance of 1941. That subsection and section 21 are the vital ones. In fact in this case the regional committee never operated at all, and the matter went straight to the board. It is conceded that an individual planter may get less than two-thirds of the sugar from his crushed cane, but it is submitted that the planters as a whole must get not less than two-thirds. The case is in a fairly small compass, and the argument falls under two heads: (a) that planters cannot get as a whole less than two-thirds; and (b) the board cannot take from or add to that two-thirds the costs incurred by the millers—for milling, bagging and transportation or anything else—or any costs which the appellant had incurred in growing his canes.

With regard to the first point, and examining section 6 (2) in detail, "guided," it is suggested, means positively guided—a person being guided to a police station by a police officer must accept his guidance. The thing by which the board is to be guided is a principle, and a principle is something which is fairly definite. "Not less than" are obviously the strongest words in the appellant's favour; it would have been easy for the legislature to have said "about" if they did not mean "not less than." With regard to "might expect to receive," the general object is that the planters should get two-thirds, but it is not certain that any particular planter is bound to get positively not less than two-thirds, so the only way to express it is in that rather indirect language. Or those words may have been used to meet the position "if no untoward events intervened"—any failure in extraction, or any disaster or anything of that kind. "Not less "than two-thirds" are the strongest part of the appellant's case, and the only reason for using those words is because the legislature had made up its mind that the group of planters as a whole are to get not less than two-thirds, and the board cannot be taken to be guided by a principle that the planters should get not less than two-thirds if they in fact get less than that amount. The board had no power or jurisdiction to fix the amount payable to the planters on a basis of less than two-thirds of the calculated extraction, and the board failed to determine the question which they were required by law to determine.

The second head of argument—that the board is not to take into account any of the various costs—can be put in three ways: (i) In determining the payment, etc., the board shall be guided by the principle and nothing else—it is an exhaustive definition. (ii) There is nothing in the Ordinance or in the contract about taking costs into account, and one would have expected to find something about if it it was intended. (iii) There is an argument on the construction of the subsequent Ordinance, No. 10 of 1942, the Transport of Heavy Goods (Rates) Ordinance, which shows that this Ordinance of 1941 was not intended to authorize the board to consider these various costs, for the fact that the power was given in respect of increased cost of transport by section 4 of the Ordinance of 1942 shows that it was not there unless so given. It is a strong argument for saying that under the Ordinance of 1941 the board has no right to consider any of these costs. It exceeded its jurisdiction in taking those extraneous matters into consideration, and failed to deal in accordance with law with the matters referred to it, and certiorari accordingly lies.

B. MacKenna Q.C. and *Gahan Q.C.* for the first respondents, the Central Arbitration and Control Board. Two quite independent points were taken for the appellant: first, that the board cannot take into account in any circumstances the matter of costs when it is determining price; and secondly, that even if it can, it can never reduce the price below the two-thirds in section 6 (2). With regard to the first point, the parties themselves would in the ordinary course of dealing take costs into account—it is a reasonable thing to do—and the position is no different if the matter of fixing price is remitted to some independent third party. There is no express provision in the Ordinance which says that the board is not to take them into account. Secondly, it is very obvious that the board would be entitled to take matters of that kind into account if it was deciding to give the planter rather more than two-thirds. There can be no reading of this Ordinance to support the appellant's first point as to costs. If it is right that the board can take costs into account, can it give less than two-thirds? If the appellant is wrong on his first point, he may still be right on his second.

Section 6 (2) states a principle which is intended to apply to every case—to individual or to corporate body. The word "average" in section 6 (2) can be used in one of two senses—as either meaning usual or ordinary or normal, or in a strictly mathematical sense. The first question is the sense in which the word is used in this subsection. The appellant contended that since the subsection prescribes a minimum quantity the board must always be able to ascertain with mathematical precision what that quantity is. It is suggested, however, that the word is used in the subsection in the first sense, and means in effect that the two-thirds is the amount of sugar which the planter might expect to receive in ordinary and normal circumstances, and, that being so, the board is free to determine the quantity and can give less than two-thirds if that is the right meaning of "average." That reading of that word is supported by the words "which planters might expect to receive"; if the legislature had intended to prescribe a mathematical minimum they would not have said anything about "might expect to receive"; they would have said "he shall get that quantity." The difficulty of finding a mathematical meaning for the word "average" in the circumstances leads to the conclusion that it is used in some other sense. "Planters" must mean planters individually, and not a particular body of planters constituting a class. If the circumstances are normal the board may give the two-thirds; if they are abnormal it may reduce it to something less than two-thirds.

There is in the ordinary use of language a distinction between a guide and a fetter; if the appellant is right, there is a fetter. "Guide" is a sensible word to use if the principle is read as being one operating in normal circumstances, the board being the judge whether the circumstances are normal or not. The respondent board is most anxious to have the right construction of the section. Ordinance No. 10 of 1942 on a legislative interpretation points strongly to the view that in the earlier Ordinance of 1941 there is a power to take costs into account, and to the extent of reducing below two-thirds.

With regard to residues (molasses and scums), if this Board holds that the Control Board is bound to give the minimum amount of sugar to the planters, it would be necessary for the Board to consider on what hypothesis as to residue that minimum is to be given. Is the planter to get the full two-thirds of sugar plus the residue, or is something to be taken away from the sugar to meet the residue? It is a matter for the Board to bear in mind when considering whether section 6 (2) really does prescribe the minimum quantity of sugar which the planters are entitled to receive.

The respondent board decided the dispute and exercised their discretion in this case properly and without in any way exceeding their jurisdiction, and certiorari does not lie. [Reference was made to *Rex* v. *Northumberland Compensation Appeal Tribunal; Ex parte Shaw.*[1]]

A. Raffray Q.C. and *Raymond Hein* (both of the Mauritius Bar) for the second respondent, Reunion Ld. English law applies to this case, not only in relation to the question whether certiorari lies to the High Court, but also in respect of the canons of interpretation which are to be applied to the sections. There are two questions: (i) Had the board a discretion under the Ordinance of 1941 to give less than two-thirds to the planters in the circumstances of this case? If they have a discretion, is it an absolute discretion or a discretion within limits? (ii) If the board have a discretion, have they exercised it rightly, and more especially, have they taken into account extraneous matters which they were not entitled to take into account? If the answer to the first question is in the negative, that is, if the appellant is right that the board had no discretion whatever in any circumstances to give less than two-thirds, then question (ii) does not arise. With regard to (i), it is submitted that the board have a discretion to give less than two-thirds within the limits of a qualified discretion. By that is meant that the board must under section 6 (2) give two-thirds and nothing less than two-thirds unless they had good cause for altering it. As was said by the Acting Chief Justice in his judgment: "The board, when determining what payment "planters should receive, have to pay due regard to the principle "which has been set out for their guidance, and, provided they "do that, they have power to assess to the best of their judgment "the average amount which should go to miller and planters "respectively; if, on good ground shown, they find that to give "to either party an average amount of sugar in accordance with "the fraction mentioned by the subsection would cause prejudice, "they are not bound to adhere to that figure; they can give less "or they can give more."

On construction of section 6 (2), if the function of the board was as contended for by the appellant—simply calculating the amounts to be allowed to the planters—that reduces the function of the board to what was described before the Supreme Court as a mere recording machine, and "determining the payment due "to planters" in section 6 (2) could hardly be said to apply to

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such a function. Reading sections 6 (2) and 21, they do not seem restricted by any such extreme limitation as would turn the board into a mere calculating agent. "Guided" is a plain English word and must be given its natural meaning. In this particular context it is hard to believe that when the legislature said that the board should be "guided" it meant that it should abrogate all powers of assessing and arriving at a decision when called on to adjudicate in a dispute between millers and planters. "Why, "if the law giver wanted to lay down a hard and fast rule as to "the manner in which the sugar should be distributed," said the Acting Chief Justice, "has he not said so in a clear, explicit, "positive and simple language; why has he used such elastic "phraseology"? [Reference was made to Craies on Statute Law, 5th ed., pp. 87–88.] It would have been easy for the legislature, had it so intended, to have said in so many words that "the board shall give two-thirds." The crux of the whole section lies in the sentence "that the average amount of sugar "which planters might expect to receive for their canes would "be not less than two-thirds." Those words give a clue to the true interpretation of the section, and to the intention of the legislature, namely, that the section should not be imperative to the point that the board could under no circumstances ever grant less than two-thirds. Admittedly the words "not less than" are very strong, and no stronger could be found, but it is submitted that they should not be isolated from the context, but should be read as part of the whole subsection in their proper perspective. The subsection ought to be interpreted as giving a limited discretion.

The other sections of the Ordinance support the submission that the whole system of free bargaining between millers and planters was cancelled, and a new system introduced, and it can safely be assumed that the policy of the law in making all those changes and in investing the Central Board with such wide powers was to ensure that each party, under the control of the board, should have a fair deal. The appellant's contention would not achieve that. The board had a limited, qualified discretion to give less than two-thirds whenever in their opinion there were good grounds for departing from the "not less than two-thirds" rule.

If they had a discretion, the second question is whether they have exercised it properly, or taken into account extraneous matters. If the board have any kind of discretion to give less than two-thirds, they could not rely on any other factors than the planters' and the millers' costs, and that is what they did. They have not taken into account any other factor than those relative costs; and they are the very same factors which the parties would have taken into account if they had been free to fix their own prices. The board have not exceeded their jurisdiction and have neither declined nor failed to exercise their jurisdiction. The judgment of the Supreme Court is well founded in law and ought to be affirmed.

Pritt Q.C., in reply. The board had no discretion to make a determination which would lead to planters as a whole getting less than two-thirds. If the respondents are right and the board had a limited discretion, they have not purported to exercise a limited discretion, but an absolute one. It is submitted that they cannot take the costs of production and transport into account. The mathematical meaning of "average" should be taken. "Guided" is a fairly strong word; it is much stronger than "shall have regard" or "shall take into consideration." The most important thing in "guided by the principle" is the principle which is laid down; the word principle is expressed too strongly to admit of any mistake. With regard to the suggestion that if the appellant is right there is nothing left for the board to do, it may be pointed out that the board has very many functions. The Ordinance and the schedule always keep the residues quite apart; the two-thirds relates to sugar.

October 6. The judgment of their Lordships was delivered by LORD PORTER. This case raises a short but difficult problem under the Sale of Canes (Control) Ordinance, No. 47, 1941, of Mauritius, which was enacted by the Governor with the advice and consent of the Council in that year. The actual matter for the consideration of the Supreme Court, from whose judgment and order the present appeal is taken, was an application for certiorari to quash a decision of the Central Arbitration and Control Board, to be followed if necessary by mandamus.

[His Lordship then referred to the facts and statutory provisions set out above and continued:] No question of differentiation between the two writs comes into consideration. If the hearing before the board is the subject of certiorari, admittedly there must be a fresh hearing and mandamus will lie. The subject-matter of their Lordships' decision is, therefore, whether the appellant has established his right to certiorari.

In argument before their Lordships there was no dispute as to the law applicable. It is common ground that in Mauritius the basic law is French, but in matters of procedure and construction English principles apply. The Supreme Court considered fully and carefully and, in their Lordships' opinion, arrived at a correct conclusion as to the law to be applied. They said in an interlocutory judgment, in support of which they afterwards gave their reasons: "It seems to us that, if the "interpretation which they [the board] have given to section 6 "(2) of the Ordinance, even if erroneous, has not led them to "exercise functions which were outside the ambit of those "entrusted to them by the Ordinance, certiorari will not lie. On "the other hand, if their interpretation has resulted in their "examining and adjudicating upon certain matters which were "beyond their purview and which they should not, therefore, "have considered, the conclusion which we have reached, after "a careful examination of the authorities on the subject, is that "certiorari would lie."

They added: "It becomes necessary, therefore, to determine "what is the extent of the jurisdiction of the board under the "Ordinance in order to ascertain whether they had power to deal "with the matter before them as they have done."

At a later hearing they decided that the board had not exceeded its jurisdiction and accordingly that the application for certiorari and mandamus failed. Like the Supreme Court, therefore, it becomes imperative for their Lordships to construe the Ordinance in order to ascertain what is the jurisdiction of the board and whether it has been exceeded.

The question is not, as their Lordships hold in agreement with the Supreme Court, whether the board was wrong in the exercise of its discretion, nor even whether it misconstrued the words of the Ordinance, but whether it took into consideration matters outside the ambit of its jurisdiction and beyond the matters which it was entitled to consider. It was said that it had done so because it had taken into account the cost incurred by the respective parties on the one hand of producing the canes, and on the other, of dealing with them at the mill and of manufacturing, bagging and transporting the sugar. The appellant's contention was that section 6 (2) either gave no discretion as to the relative proportions to be given to each of the parties, i.e., it enacted that the planter should receive two-thirds—no less and no more—or, if that proportion could be varied, it could only be varied by giving the planter a greater share, i.e., he might receive more than two-thirds, but must not receive less.

Primarily, the solution must depend on the true meaning of the subsection. If that meaning is plain, it is conclusive and it is unnecessary to go outside its terms. But the language must be read having regard to the relevant attendant circumstances, and an Ordinance must be read as a whole. Expressions may indeed be so clear as to admit of no doubt, but it is seldom that an enactment can be so easily construed, and in their Lordships' view this is not a case where that solution can be adopted.

The subsection itself presents some difficulty of construction. On the one hand, the respondents argue that if not less than two-thirds must be given to the planter, it would have been easy to say so. " The board shall allocate to the planter not less than " two-thirds of the amount " (or, if you please, " of the average " amount ") of sugar which a ton of such canes " may normally " be expected to produce " would, they contend, have been the form of language to be employed. Whereas, the use of such circumlocution as " shall be guided by," " the principle," " might expect to receive," " would be not less than," all point to the conclusion that what was being enjoined upon the board was a principle or outlook with which it should embark upon its task. The board, say the respondents, is directed to approach its computation by regarding two-thirds of the sugar content as being the normal quantity which the planter would expect to get, but having made this approach must consider whether there is any reason why he should receive more or less than that normal quantity. He might, they maintain, be found entitled to less or more, but the board is to regard the giving of less as exceptional, whereas the giving of more may be normal enough. The matter is not to be approached on the principle that the amount to be given is such quantity as the board may in their absolute discretion think proper, without any suggestion or guidance as to what it should be. Normally, it must expect it to be two-thirds and must bear that consideration in mind in coming to its conclusion.

If, then, the board, in coming to its determination, had neglected or rejected that consideration, it might well have been held to have exceeded its jurisdiction in taking it to be unfettered, whereas it was subject to a limitation of outlook but not confined to a particular proportion.

Whether they used a correct discretion or not is, of course, irrelevant in a case where certiorari is claimed. As long as they take into consideration only matters within their jurisdiction, the resultant decision, right or wrong, is for them and for them only.

The other terms of the Ordinance are at least not inconsistent with the view which commends itself to their Lordships and, indeed, seem to them rather to support than be hostile to it.

The powers given to the board by section 5 of summoning and examining witnesses, of entering mills and plantations, of ordering the production of documents and of requiring tests and experiments would of themselves imply a right of inquiry into methods of conducting business and the cost incurred on either side, and would strengthen the view that an inquiry into the respective costs of millers and planters was entrusted to the board, unless the conclusion (which their Lordships have rejected) be reached that section 6 (2) plainly forbids the allocation to planters of less than two-thirds. Certainly the regional committees, from whom an appeal lies to the board, are not fettered by any such rigid allocation or, indeed, any proportionate allocation at all, and it would seem odd that in that state of affairs the board should be rigidly bound, though it might be natural to give it some guidance.

It is true that section 6 (2) makes no mention of the cost of production by either party, and if the giving of no less than two-thirds is prescribed, it might be possible to argue that the cost of production to the planter, or of conditioning and transportation to the miller, is not a relevant factor, but even then it is difficult to see, unless the expenses of each side be taken into consideration, how the proper proportion of remuneration is to be arrived at. At best the absence of a reference to costs is little more than a neutral matter.

In their Lordships' opinion, the board was not precluded from taking the matters complained of into consideration, and it follows that the board did not exceed its powers and that the Supreme Court were right in refusing to grant certiorari or mandamus.

It will be observed that in coming to this conclusion their Lordships have not placed reliance on the argument that the Ordinance substituted certain specific regulations for a system of free bargaining, and that it is a reasonable deduction from this fact that the Ordinance would be unlikely to present a rigid rule or fetter the discretion of the board beyond those matters essential to the carrying out of the government's policy. Their

Lordships feel that such considerations are too indefinite to found an opinion upon, but, except on this matter, they find themselves in entire agreement with the judgment of the Acting Chief Justice and his colleagues and would humbly advise Her Majesty that the appeal should be dismissed with costs.

Solicitors: *A. L. Bryden & Williams; Burchells; Charles Russell & Co.*

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OPANIN ASONG KWASI AND OTHERS . . APPELLANTS;

AND

JOSEPH RICHARD OBUADABANG LARBI . RESPONDENT.

ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL.

West Africa—Native customary law—Arbitration—Right to resile—Enforcement of award—Powers of Native Court "B"—Native Courts (Colony) Procedure Regulations, No. 10 *of* 1945, *reg.* 40.
Native Appeal Court — Appellate jurisdiction only — Competently created—Native Courts (Colony) Ordinance, No. 22 *of* 1944, *s.* 3.

When a suit, which was brought by the respondent in the Native Court "B" claiming against the appellants a declaration of title to certain land, came before that court, it was suggested by representatives of the Odikro and his Elders, and it was mutually agreed by both parties, that the dispute should be submitted to arbitration, and the court then adjourned the case. After the arbitrators had heard the evidence and had sent messengers to view the land under dispute, the appellants sent a letter intimating their decision to dissociate themselves from the arbitration. The arbitrators later gave their decision in favour of the respondent. The case then came again before the Native Court "B," when, on the respondent's application, the court ruled that the award should be accepted as the judgment of the court.

The appellants contended before the Board, inter alia, that if, contrary to their submission, the proceedings before the arbitrators were in the nature of an arbitration and not of negotiation for a settlement, either party was entitled to resile at least till the date when the award was made:—

Held, first, that the proceedings before the Elders were of the nature of an arbitration and not merely of a negotiation for a settlement. While it is established that under native customary law there is no right to resile from an arbitration after the award is made (*Ekua Ayafie* v. *Kwamina Banyea* (1884) Fanti L.R. 38, and *Kuturka Yardom* v. *Kurankyi Minta III*, Gold Coast L.R. Full Ct. 1926–29, 76), there is no authority on the question of the right to resile before the award. Since, however, the parties gave their consent to the submission of the dispute to the Elders without any express reservation of the right to resile, and since there is no right to resile after the award is made, the appellants had failed to establish that a right so contrary to the basic conception of arbitration is recognized by native customary law.

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* *Present*: LORD NORMAND, LORD MACDERMOTT and LORD COHEN.

Held, secondly, that although no authority was cited to show that it was incompetent for the Native Court "B" to adjourn with the consent of the parties in order to allow the dispute to be determined by arbitration, it would be unfortunate if so convenient a procedure were prohibited. Further, inasmuch as under regulation 40 of the Procedure Regulations of Native Courts made under section 70 of the Native Courts (Colony) Ordinance, 1944, the native court had authority to make in its discretion any order within its powers and jurisdiction which it considered necessary for doing justice, and since the order of the native court enforcing the award was one within its powers and jurisdiction in an action for enforcement, the court could under regulation 40 competently pronounce it in the pending case since that would do justice and avoid multiplicity of actions.

Section 3 of the Native Courts (Colony) Ordinance, 1944, which provides that "The Governor in Council may by order provide for "the constitution of Native Courts . . . and may by the same or "a subsequent order authorize a Native Court to sit as a Native Appeal Court . . .", contains nothing which requires that the words "Native Courts" should not include Native Appeal Courts. It is therefore competent by order to constitute a native court having only appellate jurisdiction, though it is also competent to constitute a native court of first instance and confer appellate jurisdiction on it by the same or a subsequent order. The provision in section 13 of the Ordinance for the grading of native courts having jurisdiction of first instance has no application to a native court having only appellate jurisdiction.

Judgment of the West African Court of Appeal affirmed in the result.

APPEAL (No. 11 of 1951) from a judgment of the Court of Appeal for Western Africa (June 1, 1950) allowing an appeal by the respondent from a judgment of the Supreme Court of the Gold Coast, Eastern Judicial Division, Land Court (June 10, 1949), which had affirmed, with a minor variation, a judgment of the Native Appeal Court, Kibi (September 23, 1948), which had allowed an appeal from the Native Court "B" Adonten, Akyem Abuakwa (August 10, 1948). The effect of the judgment appealed against was to restore the judgment of the Native Court "B."

The following introductory statement is taken from the judgment of the Judicial Committee:—The subject-matter of the suit was the title to a parcel of land at Mfrano, near Anum Apapam in the Akim Abuakwa District. But the appeal was only indirectly concerned with the merits of the dispute. There were two issues presented for decision: first, the nature and effect of proceedings, described as an arbitration in the record, which took place while the suit was pending in Native Court "B"; and second, the question whether the Native Appeal Court, Kibi, was a court regularly and properly constituted.

The suit was brought in the Native Court "B" of Adonten, Akyem Abuakwa, by the respondent and by one Kwasi Prince. Kwasi Prince, however, was now said to have died before the action was begun and the present respondent was in fact the sole plaintiff. He claimed against the present appellants a declaration of title to certain land and an injunction. The case came before the court for hearing on October 27, 1947. What then took place was narrated in the "Findings of Special Arbitration" which subsequently came before Native Court "B." The facts stated in the findings, it should be noted, were not challenged by the appellants. The document bore that at the hearing a representation of the Odikro of Apapam and his Elders appeared and offered "to withdraw the said action from the Native Court 'B' of "Kukurantumi for arbitration." It was then "mutually "agreed upon by both parties to submit the dispute to arbitra-"tion by a panel of Elders of Apapam." The arbitration court comprised 11 persons, of whom four were Stool Holders. The sum of five shillings was paid by Opanin Adu, one of the Stool Holders, as an adjournment fee, and the sum of 16 shillings was paid by each of the parties to signify their consent to refer the matter to the arbitrators. The court then adjourned the case.

The arbitration proceedings also were fully described in the "Findings of Special Arbitration" which was subscribed by "Opanyin Kwami Ayim President, Arbitration Panel of Apapam "Elders." It was a formal document setting out the proceedings with great clearness and considerable detail. It appeared from it that the case was duly called for hearing on November 5, 1947, when both parties were present. Every effort was made by the arbitrators to give each side the fullest opportunity to state its case thoroughly and to call witnesses. There were findings which summarized the evidence with comments on the value of some of the testimony offered. The document then stated that after hearing all the relevant statements on both sides and their

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witnesses and thoroughly satisfying themselves through cross-examinations the arbitrators decided to send messengers to view the land under dispute. Both parties were asked to pay an advance of £12, which they paid. The messengers were appointed and a date for viewing the land was fixed, and both parties were asked to meet the messengers on the spot and agreed to do so. The viewing party met both parties on the land, but the appellants refused to show their boundaries. The respondent, on the other hand, took the party to the land and pointed out the boundaries. After viewing the land the messengers instructed both parties to appear before the arbitrators at Apapam on November 18, 1947. At that sitting of the arbitrators the respondent was present, but the appellants absented themselves and sent a letter intimating their decision to dissociate themselves from the arbitration and demanding a refund of the £12 advanced by them. It was not clear whether that sum was in fact refunded, but their Lordships of the Board did not consider that that was a material point.

The arbitrators considered the questions before them. After a long discussion they decided " to break the last minute dead-" lock created by the defendants (the appellants), to brush aside " their objections and to proceed with the case." They then gave their decision in favour of the respondent.

The case again came before the Native Court "B" on August 9 and 10, 1948. The respondent moved the court to enforce the arbitration award, but the appellants objected, partly on the technical ground that no record of the arbitration proceedings had been taken, and partly on the ground that they had withdrawn from the arbitration. The court ruled that the award should be accepted as the judgment of the court. It prefaced its ruling by narrating that the Opanin Yaw Adu on behalf of the Odikro of Apapam and his Elders had at the first hearing " sub-" mitted to withdraw the case for settlement," that the parties had agreed and the case was adjourned with their consent, and that the Elders of Apapam had held an arbitration.

In the Native Appeal Court the president, having stated that the appellants objected to the award on the ground that they had not consented to it, observed somewhat ambiguously, as it appeared to their Lordships of the Board, " so far as the defen-" dants-appellants have consented to the award of the arbitration, " they cannot extricate themselves from the arbitration award." He then brushed aside a purely technical objection based on an error of date, and proceeded: " We find that there were many "irregularities in the lower court in the procedure"; but he specified only one irregularity, the adjournment of the case instead of striking it out for the arbitration. Finally, he said that in the circumstances the appellants did not accept the award, and in order to avoid misunderstanding and multiplicity of actions there should be a retrial by Native Court "B."

An appeal was taken by the respondent to the Land Court. The judgment of the judge in that court was that the Native Appeal Court was right in setting aside the judgment of the Native Court "B," but he thought that the case should be retried by the Native Appeal Court with a different panel from that which heard the appeal.

In the respondent's appeal to the West African Court of Appeal the President said that the first question to decide was whether the proceedings before the Elders amounted to an arbitration and whether the parties were bound by the award, and that a perusal of the proceedings had satisfied him that this was not a mere negotiation for a settlement but that it was a formal arbitration. He also noted the contention that the award was not under native customary law binding on the appellants since they withdrew from the proceedings at the time of the inspection of the land. He dismissed the contention, but unfortunately he based his decision mainly on precedents which dealt with the enforcement of awards in proceedings from which neither party had resiled before the award was made. Smith Atg.C.J. agreed with the President. He observed that he construed the judgment of the Native Appeal Court as meaning that since the case was not struck out but only adjourned it must be inferred that the proceedings in question had been merely a negotiation for a settlement. Lewey J.A. also agreed with the President. He said that the Native Appeal Court seemed to him to have regarded the proceedings as of the nature of an arbitration, but had criticized the adjournment as an irregularity.

1952. October 28, 29, 30. *Quass Q.C.* and *M. P. Solomon* for the appellants. All that the appellants are now asking for is that there should be a new trial as directed by the Native Appeal Court and the Land Court. There has really been no trial at all, and the matter should be investigated afresh. The judgments of the West African Court of Appeal appear to have proceeded on the basis that despite irregularities in the hearing before the Native Court "B" there was a valid arbitration award binding on the parties. The questions for the Board's consideration

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concern this so-called arbitration, because, if it was an arbitration at all, it was something very different from the type of arbitration to which one is accustomed in England. There are three kinds of arbitration in West Africa: (a) arbitrations under the Arbitration Ordinance, c. 16 of the Consolidated Laws of the Gold Coast, 1936, Vol. I, p. 592, and that kind of arbitration is almost on all fours with arbitrations under the English Arbitration Act; (b) an arbitration under Ord. 51 set out in Sch. III to the Courts Ordinance, No. 7 of 1935, and again this was not that kind of arbitration; and (c) with which the Board is concerned, native arbitrations by or under native customary law. Ord. 51 in Sch. III to the Act of 1935 gives power to the courts, that is, the British courts, in West Africa, to have a matter referred to arbitration by consent of the parties. There is no corresponding provision in the regulations dealing with Native courts, and that may be of some importance so far as procedure goes.

If there has been an arbitration in the present case, then it was a native arbitration by or under native customary law. It would seem that these native arbitrations partake more of the nature of negotiations with the assistance of arbitrators or persons in the same position as arbitrators with a view to a settlement being arrived at between the parties. The questions in regard to native arbitrations are: (i) Whether to constitute a valid arbitration by or under native customary law it is not necessary for the parties to consent not merely to the submission but to the whole course of the proceedings. (ii) Whether a party who has consented to the matters in issue being arbitrated can withdraw his consent before the proceedings are concluded. It is submitted that the cases do show that he can so withdraw. (iii) Whether the matters in issue in this case were ever properly submitted to arbitration in the way that submission to arbitration would be understood in this country, or whether they were not, on a more correct interpretation of the facts, referred for investigation with a view to a settlement being negotiated. (iv) Whether the Native Court "B" was right in ordering the so-called award to be accepted as the judgment of the court. (v) Alternatively, whether the Native Appeal Court and the Land Court were not right in ordering the whole matter to be investigated afresh by the court.

There can be either an arbitration or a law suit; there cannot be the two going on together in the Native court. At the time when a number of cases which the Board will have to consider came before the courts in West Africa there was in operation the Native Administration (Colony) Ordinance, Laws of the Gold

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Coast, 1936, Vol. 2, c. 76, section 58 of which continued the power of a Native authority to act extra-judicially as an arbitrator. That Ordinance was repealed by section 76 of the Native Authority (Colony) Ordinance, No. 21 of 1944. There is nothing in the repealing Ordinance similar to section 58 of the earlier one. Section 50 of the Native Courts (Colony) Ordinance, No. 22 of 1944, is of importance as justifying, it is submitted, the Land Court in sending the case to the Native Appeal Court for a rehearing. There is a whole code of procedure laid down for the Native courts: the Native Courts (Colony) Procedure Regulations, No. 10 of 1945, regs. 3, 9, 13, 16, 20, 24, 26–30.

Whatever the technicalities, it was not open to the arbitrators to proceed with the arbitration after the appellants had withdrawn; there cannot be anything like an ex parte proceeding before a Native arbitrator. It is submitted that this case was decided by the West African Court of Appeal on a fallacy, and on a point taken by the court itself, and one without substance. The basis of their judgment was that as there had been an arbitration that was an end of the matter. It must be considered what is necessary to make the result conclusive against the parties in a Native arbitration: it is something quite strange to the Native idea that parties should at the outset bind themselves once and for all as arbitration is understood in this country—that is something completely alien to the Native mind. The cases show that there is nothing to stop a party withdrawing from a Native arbitration before the proceedings are concluded, and that is all that the appellants need to show to succeed. It was held in *Ekua Ayafie* v. *Kwamina Banyea* [1] that where matters in difference between two parties are investigated at a meeting, and in accordance with customary law and general usage a decision is given, it is binding on the parties, and the Supreme Court will enforce such decision. But that, it is submitted, is a very poor foundation on which to build up a line of authorities in West Africa that once there has been a submission to a Native arbitration that is an end of the matter. [Reference was also made to *Yao Mensah* v. *Botchwey.*[2]] *Okyeame Kwasi Mire* v. *Kwasi Danso* [3] is an authority for the proposition that it is an essential element that the parties should have agreed to the

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[1] Sarbah's Fanti L.R. (2nd Selection) (1904) 38.

[2] (1913) Some Judgments of Divisional and Full Courts in Gold Coast Colony (1911–16), 58.

[3] (1924) Selected Judgments of Divisional Courts of Gold Coast Colony (1921–25), 95.

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matter being arbitrated not only at the beginning, but right to the end. If the judgment in that case be right, as it is submitted it is, it throws a flood of light on the nature of Native arbitrations. The parties must agree not only to the holding of the arbitration, but must expressly agree to be bound by the award. In *Abotche Kponuglo* v. *Adja Kodaja*[4]—a judgment of the Board—it was said: "It is, however, enough for the purposes "of this appeal to say that there is weighty evidence, which "their Lordships are prepared to accept, to the effect that the "appellants resiled from the arbitration proceedings before the "award was issued." The way the matter is dealt with in England is set out in Halsbury's Laws of England, 2nd ed., Vol. 1, p. 633, s. 1081. [Reference was also made to J. B. Danquah's Akan Laws and Customs (1928), pp. 83 et seq. and 156.] *Kuturka Yardom* v. *Kurankyi Minta III*[5] contains nothing to show what are the ingredients necessary to make a binding award in a Native arbitration.

There does not appear to be anywhere any specific statement that a party can resile; but that he can do so would seem to follow from what has been said in some of the cases. In *Hagan* v. *Adum*,[6] for example, it was said that "An attempt by the "appellants to found on an alleged arbitration award, prior in "date to the decision of the Native tribunal, may be disposed "of. . . . Its date is not proved, and the evidence was quite "insufficient to prove that the award was accepted as final and "binding by the parties." That does not go as far as the passage in the Board's judgment in *Kponuglo's* case.[7] The evidence in the present case shows clearly that the award was not accepted as final and binding. The most recent case touching this point would appear to be *Mensah* v. *Takyiampong*,[8] but that case is differentiated from the present by the statement that both parties had agreed to the arbitration and to the award. There appears to be no authority contrary to the appellants' submission. The West African Court of Appeal completely ignored the point made on behalf of the appellants—that they could resile from the arbitration; their fundamental error was in saying that "as there was a proper and valid arbitration both the judge and "the Native Appeal Court were wrong in ordering a re-trial and "the award of the arbitrators should stand."

[4] (1933) 2 W.A.C.A. 24, 27.

[5] (1926) Gold Coast Reports Full Court (1926–29), 76.

[6] (1939) 5 W.A.C.A. 35, 37–8.

[7] 2 W.A.C.A. 24, 27.

[8] (1940) 6 W.A.C.A. 118.

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Dingle Foot and *Gilbert Dold* for the respondent. There are two points: (i) whether the award was binding on the parties or whether it became binding by reason of the order of the West African Court of Appeal; and (ii) whether the Native Court of Appeal was properly constituted. On the first issue the question is whether a party, having elected to go to arbitration under native customary law, can resile before or after the award. Can he, at the very last moment, having agreed to an arbitration in the first place, having taken a full part in the proceedings, having called his evidence and cross-examined the witnesses for the other side, suddenly decline to take part any longer and so put an end to the arbitration proceedings? What are being dealt with here are proceedings under native customary law, and sometimes the word "settlement" is used and sometimes "arbitration," and the cases show that a clear distinction is not always made. The introduction of English notions about arbitration must be guarded against.

Oppon v. *Ackinie* [9] decided that the Supreme Court Ordinance, 1876, which preceded the Courts Ordinance, did not sweep away the judicial powers of the Native kings and chiefs. It is submitted that native customary law governs not only the substantive law administered by the Native tribunals, but also their practice and procedure except and in so far as it is laid down by Ordinance, Order or regulations: Native Courts (Colony) Ordinance, 1944, s. 23; Native Courts (Colony) Procedure Regulations, 1945, reg. 40; *Chief Yaw Nimo* v. *Chief Kwaku Wuo.*[10] There is nothing here to show that the Native Court "B" was not acting fully within its powers and within native customary law and practice when they adjourned the case and subsequently upheld the award. [Reference was also made to *Nkwantahene Nana Kwame Boakye Tromu II* v. *Bechemhene Nana Fosu Gyeabuor II.*[11]] Those cases show that the Native court can proceed on evidence taken before somebody else; it can send persons to view the land and receive their report and proceed on that report.

On a claim to title to land it would appear that there are two forms of procedure, either a formal trial before a Native court, or what is loosely called in various reports an arbitration, which also is a somewhat formal proceeding: J. B. Danquah's Akan

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[9] (1887) Sarbah's Fanti Customary Laws (Gold Coast), 207, 209–10.

[10] Unreported, P.C.App. No. 12 of 1941.

[11] Unreported, P.C.App. No. 50 of 1944.

Laws and Customs (1928), pp. 68, 78–9, 81, 83, 86. Here the proceedings started before the "B" court, and then both parties were content to have the matter decided by this other procedure, and it is submitted that both were entitled to do that. That procedure was gone through, and at the end there was a valid award, and the respondent is entitled to rest upon that. But even if he is not, in the alternative, and having regard to the kind of procedure adopted in Native tribunals, he was entitled to hold the judgment in the terms of the award. The authorities which have been referred to do not take the matter very much further, except that they do support the contention as to the two forms of procedure, and they do show that when the word "arbitration" is used by the native customary law it is in the nature of a somewhat formal inquiry by arbitrators or by persons occupying a similar position. *Ekua Ayafie* v. *Kwamina Banyea*[12] disposes of the suggestion that it is possible for a party to object after the award. *Yao Mensah* v. *Botchwey*,[13] *Tettey* v. *J. T. Provincial*[14] and *Okyeame Kwasi Mire* v. *Kwasi Danso*[15] do not carry the matter any further. Passages in *Kuturka Yardom* v. *Kurankyi Minta III*[16] are of some assistance in showing what an arbitration is under native customary law, and it was said there that the award of such a tribunal would in the ordinary way be enforceable by the court.

There is nothing to show that a party can resile; there is no authority either way, with the possible exception of the sentence in the judgment of the Board in *Abotche Kponuglo* v. *Adja Kodaja*.[17] What it really comes to is that this is an alternative form of trial. The court below in *Kponuglo's* case[17] said that when there was a meeting to discuss matters the decision was binding on the parties and would be upheld by the Supreme Court. The Privy Council overruled that case on another point; the question whether one of the parties could resile from the arbitration and thus put an end to the proceedings in that way was really never canvassed in that case at all. *Hagan* v. *Adum*[18] was not a case of an arbitration according to native customary law at all; it was an arbitration by lawyers, and was an entirely different type of arbitration, and the issue whether a

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[12] Sarbah's Fanti L.R. (2nd Selection) 38.

[13] (1913) Some Judgments of Divisional and Full Courts held in the Gold Coast Colony (1911–16), 58.

[14] Ibid. 67.

[15] (1924) Selected Judgments of the Divisional Courts of the Gold Coast Colony (1921–25), 95.

[16] Gold Coast Reports Full Court (1926–29), 76.

[17] 2 W.A.C.A. 24.

[18] 5 W.A.C.A. 35.

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party was entitled to resile was again never canvassed. It is an issue which never has been canvassed by any tribunal until these proceedings before the Board.

While there is nothing about the question of resiling, the authorities do establish that where there has been an award arrived at by arbitration under native customary law, that award is binding on the parties and will be enforced by the courts. It is still open to a dissatisfied party to impugn the award on the ground that the arbitration proceedings had not been properly conducted or that one of the arbitrators had been guilty of misconduct. Unless he can successfully impugn the award he is bound by it: *Yardom's* case.[19] In *Ekua Ayafie's* case[20] the judge did use the words "court of arbitration," and that is a very apt description—a tribunal to which one can go instead of going to a Native court.

If it is right that the award is enforceable once it has been made, the appellants must establish that there does exist this right to resile before the award is made. It is submitted that it is not open to them at this stage, having gone through all these proceedings, and at the very last moment to say that the matter was not properly before the arbitrators. The Native Court "B," administering native customary law, with which presumably they were familiar, and being perfectly well aware of the fact that the defendants had attempted to resile, said with those facts in mind that this was a good award. The Native Appeal Court never considered whether a party could resile; they should have done so. The Land Court did not add anything to what had gone before, and the judge had no argument before him directed to this particular point. Nowhere was it suggested in argument before the West African Court of Appeal that the award was bad because the defendants resiled before the award was made, and naturally enough that court did not deal with the issue because nobody invited them to. This point never having been brought to the attention of the West African Court of Appeal there is a question whether it is open now. The appellants are asking the Board to lay down a proposition of native customary law for which there is no authority whatever, and which has not even been canvassed below.

The remaining point is the submission that the Native Appeal Court had no jurisdiction because it was not properly constituted, and if that be right all the proceedings subsequent to the judgment of the Native Court " B " are a nullity. This contention is based on section 3 of the Native Courts (Colony) Ordinance, 1944, the meaning of which, it is submitted, is clear; a court of first instance has first to be constituted, and it may then be given appellate functions in addition to the original functions which it may have. Instead of following the provisions of section 3, the Governor in Council proceeded to appoint a number of Native Appeal Courts without any original functions at all. It is clear that there should be these four courts, " A," " B," " C " and " D," and that in certain cases the superior courts, " A " and " B," should have appellate powers. That is obviously what is contemplated by section 3—an original court with appellate functions as well. If it had been intended that the Governor in Council should create a court of appeal as such there is no reason why the legislature should not have said so.

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[19] Gold Coast Reports Full Court (1926–29), 76.

[20] Sarbah's Fanti L.R. (2nd Selection) 38.

If the case has to go back for a new trial it ought to go back to the Native court of first instance.

Quass Q.C. in reply. It was said for the respondent that it ought not to be assumed that the Native court's procedure was wrong, and reliance was placed on regulation 40 on the question of procedure. It is submitted that regulation 40 does not assist. The case was merely adjourned for the matter to be settled (Danquah's Akan Laws and Customs, p. 21). In any event, the court had no power to decide that the award should be accepted as the judgment of the court. With regard to resiling, there is no direct authority on the point, but the dicta in the cases are all one way, and it cannot be coincidence. In *Mensah* v. *Takyiampong* [21] and the case before the Board, *Kponuglo's* case,[22] it is plain that the award was relied on before the Court of Appeal and before the Board, and the Board thought it sufficient that he did resile. That is a justification for the submission that the appellants were entitled to resile. They are entitled to have their case tried.

November 24. The judgment of their Lordships was delivered by LORD NORMAND, who dealt first with the question of the constitution of the Native Appeal Court:—This issue was raised by the respondent's counsel, who was allowed to address argument upon it to their Lordships, as it goes to jurisdiction, though it is not properly raised in his case. He maintained that the Native Appeal Court was not lawfully constituted and

[21] 6 W.A.C.A. 118, 119.

[22] 2 W.A.C.A. 24, 25.

therefore that all the proceedings subsequent to the judgment of the Native Court "B" were null.

This is a preliminary issue which must be decided before entering upon the first issue, the nature and effect of the so-called arbitration proceedings. It can fortunately be disposed of without considering the circumstances of the particular suit in which it has arisen. It depends on the construction of section 3 of the Native Courts (Colony) Ordinance, 1944, which reads as follows: "The Governor in Council may by order provide for the constitution of Native Courts which shall exercise jurisdiction in accordance with this Ordinance within such area as may be defined in the order and may by the same or a subsequent order authorize a Native Court to sit as a Native Appeal Court: and any such order shall assign to any Native Court thereby constituted such name as the Governor may think fit."

The term "Native Court" is defined by section 2, and it includes a Native Appeal Court unless the context otherwise requires. The Native Appeal Court in question was instituted by Order No. 17 of 1945 as a Native Appeal Court without jurisdiction as a court of first instance. The respondent's contention is that it was incompetent for the Governor in Council to proceed in this manner, and that the only competent mode of creating a Native Appeal Court was to create a Native Court of first instance, and then to confer appellate jurisdiction upon it either by the same or by a subsequent order. This point was taken for the first time in the West African Court of Appeal. The President, in his judgment, said that he was inclined to think that there was substance in the respondent's submission, but that it was unnecessary for him to decide it.

In their Lordships' view the respondent's reading of section 3 is too narrow. The section is not artistically drawn, but it contains nothing which requires that the words "Native Courts" should not include Native Appeal Courts. If so, it is competent by order to constitute a Native court having only appellate jurisdiction, though it is also competent to constitute a Native Court of first instance and confer appellate jurisdiction upon it by the same or a subsequent order. By subsequent provisions of the Ordinance (section 13), Native Courts having jurisdiction as courts of first instance must be graded as A, B, C or D courts, but this has no application to a Native Court having only appellate jurisdiction. The respondent's submission on this head accordingly fails.

Their Lordships therefore turn to the first issue, the nature and effect of the so-called arbitration proceedings. [His Lordship then stated the facts set out above and continued:] The appellants' submission to their Lordships is that the Native Court "B" had erred, and the submission was supported on alternative grounds: (a) that the so-called arbitration was not an arbitration as understood in British jurisprudence, but merely an attempt to arrive at a settlement agreed by the parties with the aid and active intervention of the Elders; (b) that even if the proceedings were of the nature of arbitration and not of negotiations, yet either party was entitled to resile at least till the date when the award was made. These matters are, it is agreed, questions of native customary law. It is therefore embarrassing to find that while Native Court "B" decided in favour of the respondent, this decision was reversed by the Native Appeal Court. Had the two courts agreed their Lordships would have been disposed to accept their ruling as an authoritative application of native customary law, which ought not to be overruled except for clear and convincing reasons. As it is, their Lordships must decide the disputed issues upon the material available in the case before them, without laying down general propositions as to native customary law, which might not consist with the results of a fuller inquiry than the scanty material in this case allows.

Their Lordships agree with the finding of the West African Court of Appeal that the proceedings before the Elders were of the nature of an arbitration and not merely of a negotiation for a settlement. The reasons can be briefly stated. The suggestion that the case should be brought before the Elders came, not from the parties themselves, but from the representatives of the Odikro, and the parties gave their consent. In native customary law the Elders have a recognized judicial function and are in fact a tribunal before which natives can bring their disputes for judicial decision. (Danquah, Akan Laws and Customs, pp. 83 et seq.) It seems to their Lordships improbable that the intervention of the Odikro and the Elders was for the purpose of aiding a settlement by negotiation rather than for the purpose of discharging a judicial function in the form of an arbitration. Secondly, the proceedings before the Elders, as narrated in their findings, have no resemblance to negotiations for a settlement, but have all the marks of a well-conducted formal arbitration. Thirdly, the Native Court "B," when the case again came before it, treated the award as an award in an arbitration and acted upon it by giving judgment in accordance with it. They knew how and with what intention the proceedings had originated, and they could not honestly have acted as they did if the proceedings had been for the purpose of facilitating a settlement. The fact that the case was adjourned is not, in their Lordships' opinion, inconsistent with this view of the proceedings; it was, indeed, appropriate to adjourn rather than to strike out the action, if only because the arbitration proceedings might for one reason or another have aborted. No authority was cited to support the appellants' contention that it is incompetent for the Native court to adjourn with the consent of parties in order to allow the dispute to be determined by arbitration, and it would be unfortunate if so convenient a procedure were prohibited. Other criticisms of the procedure of the court were submitted by counsel for the appellants. It was said that if the proceedings were of the nature of an arbitration the court ought not to have given judgment conform to the award, but ought at that stage at latest to have struck out the action leaving to the respondent the right to raise another action to enforce the award. Their Lordships are of opinion that there is no substance in this argument. The Native court had authority under regulation 40 of the Procedure Regulations of Native Courts, made under section 70 of the Native Courts (Colony) Ordinance, 1944, to make in its discretion any order within its powers and jurisdiction which it considered necessary for doing justice. The order made in the present case was an order within the court's powers and jurisdiction in an action for enforcement, and under regulation 40 the court could competently pronounce the order in the pending case since that would at once do justice and avoid multiplicity of actions. It was further said that the court had refused to hear witnesses before giving judgment and that such a refusal might have resulted in shutting out objections to the award, as ultra fines compromissi or as being vitiated by the improper conduct of the arbitration, which could have been stated and heard in an independent action to enforce the award. The answer to this is that there never has been, and there is not now, any suggestion that the arbitrators either exceeded the powers committed to them or acted otherwise than with exemplary probity. If objections of that sort had been stated it would, of course, have been the duty of the court to entertain them and to receive evidence in support of them, and there is no reason to suppose that they would have refused to do so. They did in fact hear a technical objection to the award, that no record had been made of the arbitration proceedings. This objection failed because evidence was immediately given that the minutes had in fact been recorded. Had other and more fundamental objections been put forward they would no doubt have been heard. But it was not the duty of the court to hear evidence which had been, or which ought to have been, led before the arbitrators.

All this is, of course, on the assumption that there was no right to resile from the arbitration before the award was made. If there is such a right it is clear that the appellants intended to exercise it and intimated their withdrawal from the arbitration proceedings to their opponent and to the arbitrators. The question is whether the native customary law recognizes such a right. It is established that there is no such right after the award is made (*Ekua Ayafie* v. *Kwamina Banyea*[23]; *Kuturka Yardom* v. *Kurankyi Minta III*[24]), but there is no authority on the question of the right to resile before the award. There is, in the judgment of this Board in *Abotche Kponuglo* v. *Adja Kodadja*,[25] a single sentence which, divorced from its context, appears to support the appellants' proposition. But in that case, as appears from the judgment of the Supreme Court, there had been no binding arbitration, and no more than an attempt to arrive at a settlement. Moreover, there was evidence that the alleged arbitrators had so conducted themselves that the party who claimed to have resiled would have had a plain right to do so even in an arbitration. Further, the proceedings, such as they were, had in the end proved abortive. Considered in the light of these circumstances the observation founded on by the appellants affords no support to their contention. No positive assistance is to be found in any of the judgments in the present case, but it is difficult to believe that if the right to resile exists it should not have been mentioned by any of the judges in any of the courts. Since it is established that the parties gave their consent to the submission of the dispute to the Elders without any express reservation of a right to resile, and since there is certainly no right to resile after the award is made, it is for the appellants to satisfy the Board that a right so contrary to the basic conception of arbitration is recognized by native customary law. In this they have failed.

Their Lordships will therefore humbly advise Her Majesty that the appeal should be dismissed. As the argument on

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[23] Sarbah's Fanti L.R. 38.

[24] Gold Coast Reports, Full Ct. (1926–29), 76.

[25] 2 W.A.C.A. 24, 27.

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section 3 of the Native Courts (Colony) Ordinance, 1944, took only an insignificant part of the time occupied by the hearing, the appellants must bear the costs of the appeal.

Solicitors: *T. L. Wilson & Co.; A. L. Bryden & Williams.*

[HOUSE OF LORDS.]

H. L. (E.)*
1952
Nov. 10, 11, 12;
Dec. 10.

GENERAL CLEANING CONTRACTORS LD. . APPELLANTS;
AND
CHRISTMAS . . . . RESPONDENT.

Negligence—Safe system of work—Window-cleaning—Defective window—Injury to window-cleaner — Lack of precautions — Employers' liability.

A window-cleaning company having contracted to clean the windows of certain premises, one of their experienced employees stepped out on to the sill 6¼ inches wide outside one of the windows which had an automatic locking device on closing. Holding on to the bottom cross-piece of the top and outer sash with his right hand, he pushed it up to the top of the window frame, the lower sash being raised a few inches from the bottom of the frame. This sash was liable to move at the slightest touch, though no complaint had been made about it, and there was evidence that similar defects were not uncommon. In consequence of this sash closing so that the woodwork at the top of it came down on the employee's finger, he lost his balance, fell and was injured. Though safety belts had been made available by the employers, he did not use one because no hooks were fixed to the structure of the premises to which it could have been attached:—

Held, that though there was no evidence of facts sufficient to establish negligence on the part of the employers in failing either to fix hooks for the safety belts into the building, or to cause the work to be done by means of ladders, they had negligently failed in their obligation to devise a reasonably safe system of work providing for an obvious danger, since they neither gave instructions to ensure that the windows should be tested before cleaning nor provided any apparatus, such as wedges, to prevent the windows from becoming closed. In leaving it to the initiative of individual workmen to take precautions against a common danger, the employers failed to discharge their duty.

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* *Present*: EARL JOWITT, LORD OAKSEY, LORD REID and LORD TUCKER.

H. L. (E.)
1952

GENERAL CLEANING CONTRACTORS LD. *v.* CHRISTMAS.

Decision of the Court of Appeal (sub nom. *Christmas* v. *General Cleaning Contractors Ld. and Caledonian Club Trust Ld.* [1952] 1 K.B. 141 affirmed.

APPEAL from the Court of Appeal (Denning and Hodson L.JJ. and Lloyd-Jacob J.).

This was an appeal from a judgment and order of the Court of Appeal dated November 29, 1951, affirming a judgment and order of Jones J. in the King's Bench Division dated May 10, 1951, whereby it was adjudged and ordered that the plaintiff (the present respondent), Ernest Lewis Christmas, should recover from the defendants (the present appellants), General Cleaning Contractors Ld., £3,500 as damages for negligence as his employers.

The action was begun by writ, on which the statement of claim was indorsed, issued on August 17, 1949, in the King's Bench Division, and was brought by the plaintiff to recover damages for breach of agreement and alternatively for negligence by the defendants as his employers in their window cleaning business, resulting in personal injuries to him. Particulars of the negligence alleged against them were set out in para. 3 of the statement of claim. These alleged that they were negligent in that they "(*a*) failed to see that the hooks or staples or other equipment "was provided to enable safety belts to be used by cleaners "upon the said building; (*b*) failed to see that safety belts were "provided or used by cleaners upon the said building; (*c*) failed "to provide ladders or any proper or safe apparatus to be used "by cleaners upon the said building; (*d*) failed to take any proper "precaution for the safety of the plaintiff or to pay any heed to "the complaints of their employees as to the condition of the "said windows or to a similar accident to one Cambian." The main complaint which was made at the trial by the plaintiff against the defendants was that they as employers failed to provide a safe system of working for him or to exercise effective supervision of the work which they by their foreman required him to carry out.

The facts are fully set out in the opinions of Earl Jowitt and Lord Tucker.

Nelson Q.C. and *Stephen Chapman* for the appellant company. It did not come within the range of any duty owed by the employers to an employee sent to somebody else's premises to ascertain that they are safe or to discover or guard against the contingency which caused the accident, viz., the defective condition of this window. It would only be if they had been to the premises and found a danger or if they had otherwise become aware of it that they would be bound to adapt their system to it. The employers were not bound to make sure that the windows were safe: that was the liability of the owners of the premises. Nor were the employers bound to arrange for the insertion of hooks for safety belts into buildings which were not their property.

The employers must defend themselves against any proved allegation made against them that their system is a wrong system and the employee must make his allegation and establish it by evidence. He must prove not only that the system is not reasonably safe but also what system would be safe: see *Colfar* v. *Coggins & Griffith (Liverpool) Ld.*[1] In this the pleadings in the present case are defective and inadequate.

The evidence is all one way as to this system which has been in operation for 20 years. There was nothing in it to show that these particular employers had failed to take reasonable care in relation to all these windows irrespective of type, while as to this particular type of window there is also no evidence to justify a finding against them. This case falls within the principle volenti non fit injuria, since the risk of a fall while doing the work in the manner customary in the trade was one which this employee must be taken as having voluntarily accepted.

The system here is that skilled window cleaners deal with the case of each window as it arises. The decision has to be made in the case of each window whether it is dangerous or not. For a system to be good it is not essential for the employers to give their employees detailed instructions on every item of the job and how to test every window. The employees are skilled men well aware of the dangers involved and as able as their employers to take the necessary precautions. There is no single simple test to reveal something wrong with a window. Each man knows that windows have different habits and he must take this into account to see that he does not lose his handhold: see *Taylor* v. *Sims*[2] and *Winter* v. *Cardiff Rural District Council*,[3] *per* Lord Oaksey.

Some accidents do not involve legal liability on the part of anyone. Here the nature of the occupation involves risk of accident and a fall is not necessarily due to negligence on the part either of the man or of his employers. *Paris* v. *Stepney Borough*

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[1] [1945] A.C. 197, 203.

[2] (1942) 167 L.T. 415.

[3] (1950) 114 J.P. 234, 238.

Council[4] indicates that one cannot say that a system is bad just because an operation is dangerous. If the test is correctly set out there a system could only be challenged if it could be said that a precaution was omitted which reasonable and prudent men would think it folly to omit. In the present case no one suggested that in the case of sash windows this was not the normal and natural system of work in cleaning them. The employers provided the employee with everything which they should provide. No one has ever before suggested that wedges must be provided to stop the windows from closing. The employers were not bound to give detailed instructions: see *Smith* v. *Charles Baker & Sons*[5]; *Cole* v. *de Trafford* (*No.* 2),[6] and *Bowater* v. *Rowley Regis Corporation.*[7]

The employers are indifferent in this case whether or not the employee was negligent; they want to know what, if anything, is wrong with their system. This is a test case to enlighten them as to their duty and to seek to have this system declared reasonably safe.

E. Ryder Richardson Q.C. and *Fortune* for the respondent. The workman complains of (*a*) failure to provide proper apparatus; (*b*) failure to provide an adequate system, and (*c*) common law negligence. This was an ordinary risk of the workman's employment in work inherently dangerous. Accordingly the employers owed him a duty to provide a safe system of work and this was a continuing obligation. Their breach of duty was their failure to foresee the dangers inherent in the job. The real trouble is that they should not have allowed the employee to stand on the sill because of its narrowness and because of the lightly balanced window and the automatic locking. A duty rested on the employers in the first place and they never shifted it to the workman either by directing him to test the window or instructing him how to test the window or providing him with wedges to keep it from shutting. In the ordinary course of the workman's employment he was required by the employers to do work, which could have been done in a safe way, in a way which they knew exposed him to danger from which they could and should have protected him. In the law of master and servant there is a duty on the master of thinking out what the dangers are and providing against them as best he can. It is now usual for employers to discuss such difficulties with their employees to find out how they are to be overcome. In the case of dangerous work it is incumbent on the employer to take very great care and one way of taking very great care is to have a system. The fact that the way this work was done was the usual way does not establish that there was a system. The way it was done showed that there was no system at all. It did not cover any of the matters referred to in para. 3 of the statement of claim. If the workman was not instructed to test the window, and if no one else was employed to do so, there is a gap in the supposed system. Further, at common law the employers were guilty of negligence even uncomplicated by the question of system. The question of volenti non fit injuria was not raised by the employers' pleadings.

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[4] [1951] A.C. 367, 382.

[5] [1891] A.C. 325.

[6] [1918] 2 K.B. 523.

[7] [1944] K.B. 476.

Nelson Q.C. in reply. Anyone who challenges long-established practice must call strong evidence in order to succeed. Here the plaintiff is trying to throw the onus of proof on the defendants. The employers sent a highly skilled man to clean windows which so far as they knew were normal windows. Such an operation as this is best left to the workman on the spot. It is better left to an experienced workman than undertaken by the employer who knows less about the matter than he does. These employers knew that this man had 20 years' experience and they were not bound to instruct him in the details of his work. The law as to system of work has never gone so far as to require this.

Their Lordships took time for consideration.

December 10. Earl Jowitt. My Lords, the respondent was a window cleaner, who had been for 20 years in the employ of the appellant company—a company whose business it was to contract with the occupiers of buildings for the cleaning of their windows.

On December 8, 1948, the appellants sent the respondent to clean the library windows of the Caledonian Club. The system which the appellants adopted involved the window cleaner standing on the sill outside the window to clean those panes which could not be reached from the inside. There had been some complaint that some of the windows in the club had been defective, in that the weights did not properly balance the sash, with the result that the sash occasionally moved at the slightest touch; but there had been no complaint relating to the windows of the library.

The respondent first cleaned such part of the window as could be reached from the inside, and then, following his employers' usual practice, he got out on to the sill, which was only 6¼ inches

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wide and some 27 feet above the basement. Having finished cleaning the top sash, he pushed it up, the bottom sash then being a few inches open. It was necessary if the top sash was to be pushed right up that the bottom sash should remain open for two reasons: first, because this particular window was a self-locking window, so that, if the top sash was right up and the bottom sash right down, the window automatically locked. The result of the window becoming locked was that it was impossible to open it from the outside and any man standing on the sill would thus have found himself locked out. The second reason was even more important, because the only way in which a man standing on the sill could support himself if the top sash was up, was to grip the bottom edge of the top sash by putting his fingers round it from underneath. It follows, of course, that he could not put his fingers in this position unless the bottom sash was open, for if the bottom sash were completely closed, then the woodwork forming the bottom of the top sash and the woodwork forming the top of the bottom sash would be immediately opposite each other and there would be no space behind which he could put his fingers. I should add that the top sash was on the outside of the bottom sash.

Whilst the respondent was standing on the sill in this position, the bottom sash for some reason closed, the woodwork at the top of the bottom sash coming down on to the fingers of the respondent so that he lost his balance and fell, sustaining serious injuries.

The action was originally brought by the respondent both against the present appellants and against the club, and judgment was given in the respondent's favour against both defendants. The decision against the club was reversed in the Court of Appeal, and from that decision there has been no appeal to this House. It remains, therefore, only to consider the position as between the workman (the respondent) and his employers (the appellants).

In the statement of claim it was alleged that the employers were negligent in that they failed to provide hooks or safety belts or ladders, and there was a further allegation, which was not particularized, stating that they had failed to take any proper precautions for the safety of their workmen.

The appellants in their defence alleged that the respondent was himself negligent in failing to equip himself with a safety belt, in taking no steps to wedge or secure the window, and in taking no steps to ascertain whether it was safe to rely on the sashes of the window for handhold. They further relied on the defence which is conveniently expressed in the maxim—volenti non fit injuria.

The evidence before the trial judge made it clear that it was the regular practice adopted by the appellants' workmen to clean windows by standing on the sill and holding on to the woodwork of one of the sashes of the window; and the respondent himself stated that his real complaint was that the window was defective in that it had not stayed in the position in which it was put. He further stated that he had had experience when working on a window of finding the bottom sash slowly running down, and added that this happened more frequently in dry weather. He stated that he had no reason to suppose that the particular window was unsafe and he asserted that the accident would not have occurred if the window had not been defective in that it was improperly balanced.

A Mr. Harrington was called on behalf of the respondent. He was an associate of the Royal Institute of Chartered Surveyors and stated that he had investigated accidents to window cleaners on hundreds of occasions. His evidence was that the only proper system of window cleaning was to see that the men should wear safety belts when standing on the sill. It is obvious that a safety belt is of no value unless some secure hook or staple is provided to which the safety belt can be fastened. The evidence was that it was very rare for such hooks to be affixed to buildings and the evidence did not suggest that there was any other safe method of affixing hooks.

The trial judge stated in the course of his judgment that a safety belt would have been useless, as there was nothing to which it could have been attached, and he proceeded as follows: "I find that when they [the appellants] sent the plaintiff [the "respondent] to clean the windows of this club they knew that "in the case of the windows in the library he would have to "clean the outside of the window standing on a sill 6¼ inches "wide 27 feet above the ground without any handhold except "the top or bottom of one of the sashes of the window, and that "he might have to move that sash in the course of cleaning "the window, and I find also that they knew that window sashes "do occasionally move and if they move are liable to cause the "hand of the cleaner to be caught between the two sashes or to "be knocked off the sash which he is holding. The conclusion "that I have come to is that the system of work provided for "the plaintiff [the respondent] on this occasion was an unsafe "system of work and that the first defendants [the appellants] "were negligent." The trial judge further found that the respondent had not himself been guilty of any contributory negligence and that he had not expressly or impliedly agreed to do the job at his own risk so as to make the maxim volenti non fit injuria applicable.

In the Court of Appeal Denning L.J. thought the appellants had failed to take proper steps to protect the respondent. "They "should," he said,[8] "have laid out the work more carefully. "One way would have been to do the cleaning from a ladder "instead of from a sill. Another way would have been to ask "the householder to allow the firm to insert hooks into the "brickwork so as to attach a safety belt. It is said by the "employers that these suggestions are not practicable; and that "it is the usual thing for the men to clean windows by standing "on the sill. That answer does not satisfy me. If employers "employ men on this dangerous work for their own profit, they "must take proper steps to protect them, even if they are "expensive. If they cannot afford to provide adequate safeguards, "then they should not ask them to do it at all. It is not worth "the risk. That seems to be the view of the London County "Council, for they have made regulations forbidding a man to "stand or kneel on a sill adjoining a highway unless he is hooked "on by a safety belt. At the hearing of the appeal it was "suggested that the accident might have been avoided if the "man had put in a block to prevent the bottom sash coming "right down as it did. This was, in effect, a suggestion of "contributory negligence. This was negatived by the judge, and "I agree with him. You cannot blame the man for not taking "every precaution which prudence would suggest. It is only "too easy to be wise after the event. He was doing the work "in the way which the employers expected him to do it and, if "they had taken proper safeguards, the accident would not have "happened." I agree with Denning L.J. that there was no sufficient ground for disturbing the finding of the trial judge and that the respondent had not been guilty of contributory negligence, but I cannot think that this consideration is sufficient to dispose of the suggestion that a block might have been inserted.

Hodson L.J. considered that the appellants should have provided either hooks or ladders.

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[8] [1952] 1 K.B. 141, 149, 150.

Lloyd-Jacob J. put the matter on a different ground. After stating that the only question was whether the appellants had taken reasonable care to provide a safe system of work for their servants, he proceeds as follows[9]: "They admittedly required "him to stand upon a ledge 6¼ inches wide and 27 feet from the "ground with no protection from a fall other than a handhold "under the bottom edge of a top sash which must necessarily be "ineffective should the lower sash become closed. If the "suggestion [is] that alternative dispositions of the window "cleaner (such as on a ladder, a cradle, or held by a safety belt) "are impracticable, a suggestion which I should not be taken as "accepting, it would appear to be incumbent upon the employer "to ensure that the involuntary closure of the lower sash during "the cleaning operation was impossible. No such step was taken "and the failure of the employers in this respect is, in my judg"ment, a failure to take reasonable care."

There was no evidence that the danger to the workman occasioned by the use of a ladder would have been less than the danger of standing on the sill, or that accidents were more frequent by the adoption of the system of cleaning which involved standing on the sill than by the use of the ladder system. It may well be that each system has its own particular risks; and in the absence of any such evidence the trial judge was clearly entitled to disregard the allegation that the appellants were at fault in not providing a ladder. Nor was it suggested in the evidence that there was any available method of fastening the rope attached to a safety belt except to a hook inserted into the brickwork; and it was stated, as I have said, that it is most unusual to find such hooks inserted in buildings in London.

It may be, in some other case, that evidence will be called to prove that there is some other method of securing the end of the safety belt, or indeed that there is some safer method of cleaning windows for which no hook is available than standing on a narrow sill, such for example as the provision of a plank projecting on the outside of the window and in some way secured on the inside. There was no such evidence called in the present case.

I am not prepared to differ from the conclusion reached by the trial judge, that the appellants were not guilty of negligence in failing to provide hooks to which safety belts could be fastened, or in failing to see that the work was carried out by means of a ladder.

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[9] [1952] 1 K.B. 141, 153.

If, however, they are not liable thus to secure the safety of their workers they are under an obligation to make the system which they do employ reasonably safe. It is an undoubted fact that a sash does occasionally move down at the slightest touch and the system of work adopted by the appellants made the worker's safety entirely dependent on the sash not moving. It does not appear that the appellants had given any instructions to their workers to test the windows before cleaning them, or that they had applied their minds to the provision of wedges or blocks to prevent the window becoming closed. It is clear that any obstruction placed at the bottom of the window would have prevented the lower sash from closing, and would thus have avoided the jar on the fingers which caused the respondent to let go of his hold and thus produced the accident. That seems to have been the view of the trial judge, and was certainly the view of Lloyd-Jacob J., and with this view I am in agreement. I think the trial judge was entitled to find that the appellants were to blame in not taking all reasonable steps to see that the system of work which they required their men to adopt was made as safe as possible.

My Lords, I am in agreement with the reasoning of the Court of Appeal in reaching their conclusion that the maxim " volenti " non fit injuria " does not avail the appellants, and under these circumstances I would dismiss the appeal.

LORD OAKSEY. My Lords, I agree that this appeal ought to be dismissed.

I agree with Jones J. that it was an unsafe system of work to employ window cleaners to work outside high self-locking windows on a sill 6¼ inches wide 27 feet above ground steadying themselves solely by a handhold without giving them any orders to keep one sash open or any appliance to prevent both sashes closing. I agree with your Lordships that it was not proved in the circumstances of the present case that it was negligent not to have provided ladders or safety belt hooks.

In my opinion, it is the duty of an employer to give such general safety instructions as a reasonably careful employer who has considered the problem presented by the work would give to his workmen. It is, I think, well known to employers, and there is evidence in this case that it was well known to the appellants, that their workpeople are very frequently, if not habitually, careless about the risks which their work may involve. It is, in my opinion, for that very reason that the common law demands that employers should take reasonable care to lay down a reasonably safe system of work. Employers are not exempted from this duty by the fact that their men are experienced and might, if they were in the position of an employer, be able to lay down a reasonably safe system of work themselves. Workmen are not in the position of employers. Their duties are not performed in the calm atmosphere of a board room with the advice of experts. They have to make their decisions on narrow window sills and other places of danger and in circumstances in which the dangers are obscured by repetition.

The risk that sashes may unexpectedly close, as the sashes in this case appear to have done, may not happen very often, but when it does, if the workman is steadying himself by a handhold, his fall is almost certain. If the possibility is faced the risk is obvious. If both sashes are closed there is no longer the handhold by which the workman steadies himself. If either sash is kept open the handhold is available and, on the evidence in this case, is, in my opinion, reasonably safe. But the problem is one for the employer to solve and should not, in my opinion, be left to the workman. It can be solved by general orders and the provision of appropriate appliances. The risk is undeniable and was not denied by the appellants' director, Mr. Mahoney (p. 159 of the appendix to the printed case, E. F.). The risk could be eliminated or lessened by orders that one sash must always be kept open where the handhold system is adopted and suitable wedges could be provided. The appellants, knowing the risk, did nothing and have appealed to your Lordships' House with the avowed object of having this system declared to be reasonably safe. In my opinion, the system as carried on by the appellants is not reasonably safe and the appellants did not take reasonable care to ensure that it was.

In the course of the argument questions were raised as to the adequacy of the pleadings, and attention was called to Viscount Simon's dictum in *Colfar* v. *Coggins & Griffith (Liverpool) Ld.*[10] that a plaintiff in such a case as the present must prove that the system adopted is not reasonably safe and also prove what system is safe, but, in my respectful opinion, what the noble and learned Viscount was dealing with was the evidence which would go to show that the system adopted was unsafe, that is to say, by proving a possible safe system. It cannot, in my opinion, be that as a matter of a law a plaintiff cannot succeed in such a case unless he proves the particular system in which the work can be performed safely.

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[10] [1945] A.C. 197, 203.

However this may be, the present case had been decided on the pleadings and evidence as they stood at the trial, no point was taken in the notice of appeal or in the printed case before your Lordships' House upon the pleadings, and the absence of the very element in the system the provision of which, in my opinion, ought to have been adopted was alleged by the appellants as evidence of contributory negligence. For these reasons I think the appeal should be dismissed.

Lord Reid. My Lords, it appears that it has for long been the general practice of window cleaners to clean the outsides of ordinary two-sash windows while standing on the window sill outside the window. When the sill is narrow, as it often is, the window cleaner must have something to hold on to, and it is unusual for there to be anything for the cleaner to grasp except part of the window itself. If the window is completely closed there is nothing to grasp, but if either the top or bottom sash is even slightly open there is room for the cleaner to insert his fingers between the wooden bar which forms the bottom of the top sash and the panes of glass in the lower sash. It might seem that, even with this hold, the cleaner's position is precarious and unsafe, but the evidence in this case is not to that effect. A window cleaner with this hold does not appear to be in greater danger than men who work in many other trades in exposed places high above the ground with apparently little to assist them to keep their balance. But a peculiar danger in window cleaning arises from the fact that sometimes a sash moves down unexpectedly so as to deprive the man of his hold, and the evidence shows that it is not very uncommon for this to happen and to cause a serious accident. The respondent in this case was severely injured by an accident of this kind.

The main case made for the respondent in his pleadings and at the trial was that this method of cleaning windows is in itself so unsafe that a master who requires his servants to adopt it is in breach of his duty to provide a safe system of working. Two other methods of doing this kind of work were advocated. In the first place it was said that it could be done by men standing on ladders. It was proved that it would have been practicable and reasonably safe to use this method to clean the outside of the window where this accident happened: this window was on the first floor. But there was no evidence about the general applicability of this method, and it seems fairly obvious that it would not be practicable in a large number of cases. The main objection to using it where it is practicable is that it takes longer and is more expensive to clean windows in this way than by standing on the sill. The other method advocated is to support the man on the sill by a safety belt. Such a belt must be attached to two hooks—one on either side of the window—and these hooks must be firmly attached to the building so as to support his whole weight if he slips. It was not disputed that, to get sufficient strength, the shaft of the hook must be driven right through the wall of the building from the outside and then anchored in some way on the inside of the wall. No evidence was led about the cost or difficulty of doing this, but it is plainly an operation which could not be carried out by a window cleaner, and, if this is to be the only alternative to using ladders, I think that I must assume that vast numbers of these hooks would be needed: the evidence shows that such hooks have only been provided in a very small proportion of existing buildings. The evidence is that even where hooks are available the men generally do not use them.

A plaintiff who seeks to have condemned as unsafe a system of work which has been generally used for a long time in an important trade undertakes a heavy onus: if he is right it means that all, or practically all, the numerous employers in the trade have been habitually neglecting their duty to their men. The evidence in this case appears to me to be quite inadequate to establish either that the window sill method is so inherently dangerous that it cannot be made reasonably safe by taking proper precautions, or that the ladder method or the safety belt method are as a general rule reasonably practicable alternatives.

That brings me to what I have found to be the most difficult part of the case. The evidence does prove that the window sill method is often dangerous if no precautions are taken, and in this case no precautions were taken; and if the respondent is to succeed it must, I think, be on the ground that it was the duty of the appellants to devise for the window sill method a proper system of precautions and instruct their servants to follow that system, and that, if they had done so and their orders had been obeyed, this accident would, or at least would probably, have been prevented. No such case is made in the pleadings and no attempt was made to prove it at the trial. The best that can be said is that the pleadings can perhaps be read so as not to exclude it, and there are a number of bits of evidence which, if eked out with common knowledge, lend support to it. I would not think it proper or fair to the appellants to consider this case were it not for the fact that the appellants' counsel in effect asked us to treat the case as a test case and enlighten employers in the trade as to their duty. In the circumstances I think that I can properly consider this case on such evidence as there is to support it.

The need to provide against the danger of a sash moving unexpectedly appears to me to be so obvious that, even if it were proved that it is the general practice to neglect this danger, I would hold that it ought not to be neglected and that precautions should be taken. It is at this point that lack of evidence causes difficulty, for there is no evidence as to what would be reasonably practicable or effective precautions. But I cannot believe that there would be any great difficulty in devising a simple method of preventing the lower sash from closing. I do not know what the best method would be. Generally the plaintiff ought to put forward some method which can be tested by evidence. But in this case I am assisted by the fact that the appellants in their defence allege negligence against the respondent " . . . (b) if he knew of the said defect, [the tendency of " this window to move easily] in taking no or no adequate steps " to wedge or secure the said window; (c) if he did not know of " the said defect, in taking no or no adequate steps to ascertain " whether it was safe to rely on the sashes of the said window for " handhold." This is in line with the impression which I get from the evidence, that a simple test would show whether a sash is loose or not and that if it moved at all easily it could be wedged or something could be placed across the window sill which would prevent the sash from closing fully. It does appear from the evidence that very simple tests after the accident showed that this sash was loose and ran down very easily. I think that this ought to have been discovered before the accident, and I think that I am entitled to assume that if it had been discovered some simple and effective precaution could have been taken. But I must confess that even in this case I make this assumption with some reluctance in the absence of evidence and I would not be prepared to do so in a less clear case.

The question then is whether it is the duty of the appellants to instruct their servants what precautions they ought to take and to take reasonable steps to see that those instructions are carried out. On that matter the appellants say that their men are skilled men who are well aware of the dangers involved and as well able as the appellants to devise and take any necessary precautions. That may be so but, in my opinion, it is not a sufficient answer. Where the problem varies from job to job it may be reasonable to leave a great deal to the man in charge, but the danger in this case is one which is constantly found, and it calls for a system to meet it. Where a practice of ignoring an obvious danger has grown up I do not think that it is reasonable to expect an individual workman to take the initiative in devising and using precautions. It is the duty of the employer to consider the situation, to devise a suitable system, to instruct his men what they must do and to supply any implements that may be required such as, in this case, wedges or objects to be put on the window sill to prevent the window from closing. No doubt he cannot be certain that his men will do as they are told when they are working alone. But if he does all that is reasonable to ensure that his safety system is operated he will have done what he is bound to do. In this case the appellants do not appear to have done anything as they thought they were entitled to leave the taking of precautions to the discretion of each of their men. In this I think that they were in fault, and I think that this accident need not have happened if the appellants had done as I hold they ought to have done. I therefore agree that the appeal should be dismissed.

LORD TUCKER. My Lords, the plaintiff's claim in this action, so far as the first defendants (the present appellants) are concerned, was based upon an alleged failure to take reasonable care to provide a reasonably safe system of work for the plaintiff, who was engaged on their behalf with one other in cleaning the windows of the Caledonian Club in London. It is perhaps more accurate to say that this is what he had to prove in order to succeed, because para. 3 of his statement of claim alleged a breach of duty " to provide a safe system of work and effective " supervision of the said cleaning " or negligence in certain specified respects. This form of action is frequently spoken of as being based on " a failure to provide a safe system of work," but this language is misleading since it omits what is an essential element in the cause of action, viz., negligence. Window cleaning is obviously a hazardous operation and—except in the case of the absolute obligations imposed in certain circumstances under the Factory Acts—there is no absolute obligation upon employers to devise a system for their employees which will be free of risk. Their only duty is to take reasonable steps to provide a system which will be reasonably safe, having regard to the dangers necessarily inherent in the operation. In deciding what is reasonable, long-established practice in the trade, although not necessarily conclusive, is generally regarded as strong evidence in support of reasonableness.

It was said by Goddard L.J. in the Court of Appeal and by Viscount Simon in this House in the case of *Colfar* v. *Coggins & Griffith* (*Liverpool*) *Ld.*[11] that in these cases the plaintiff must allege and prove specifically what is the defect in the system of which he complains. In other words, it is not sufficient that the system adopted was in fact unsafe, he must show something which could reasonably have been done or omitted which would have made the system reasonably safe and that this failure was the cause of his accident.

In the present case the plaintiff went to trial relying on two specific allegations, viz. (1) the failure to supply safety belts and hooks to which they could be attached; (2) the failure to supply ladders. He called as a witness in support of his case a chartered surveyor who had inspected the window in question. He was allowed, without objection, to give " expert " evidence—based upon his experience gained from giving evidence in similar cases —to the effect that the " proper " method was to use safety belts. He agreed, of course, that unless proper attachments were fixed to the building such a method was useless and that in the absence of such attachments, which were very rarely found on buildings, it was customary in the trade for windows to be cleaned from the sill by handhold as in the present case. He said nothing about the use of ladders, and in fact there was very little evidence in the case as to the circumstances in which ladders are used in the trade.

The plaintiff stated that ladders were only used on this building for those windows which could not be opened. He had had more than 20 years' experience of window cleaning but gave no evidence as to when it is customary to use ladders for external cleaning.

Ladders were referred to in three places in the defendants' evidence. At p. 121 of the appendix to the printed case at G, Mr. O'Gorman, the defendants' manager, was asked, in cross-examination: " Do you ever consider the provision of ladders " for your men, for such windows where there are no hooks for

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[11] (1943) 76 Ll.L.Rep. 1, 4 (C.A.); [1945] A.C. 197, 203.

"safety?" He answered: "Not unless they are all windows "which require the use of ladders. With an ordinary window "with what is a reasonably safe sill to stand on, we allow him "to clean it in that fashion."

At p. 146 at B the following appears in the cross-examination of Mr. Mahoney, a director of the defendant company. Q. "On "that view, it is possible to send a lorry with two or three ladders "and cleaners for each ladder." A. "Yes, but we would not get "a job." Q. "Why not?" A. "We would have to price our "job according to whether long or short ladders . . ." Q. "Would you agree that it would be much safer on a high building "to clean the windows by ladder than by putting men up on the "sills with no safety belts and no hooks?" A. "I agree, but "we do not price for a job with long ladders if it is not necessary. "If the windows call for long ladders all our competitors . . ." At p. 147, dealing with the report which had been made when the building was inspected prior to the contract for periodical cleaning and what such report should have contained, he was asked at E: Q. "And accordingly that this was a building where safety belts "or ladders were essential for safety?" A. "No." Q. "No?" A. "Because these windows are sash windows opening in the "normal way, and any window cleaner sent, even with long "ladders, will still go and clean them by standing outside on the "sill." There were clearly matters in this evidence which might have been further investigated. So far from this being done the witness was interrupted at vital points and the position with regard to the circumstances in which ladders are customarily used and the comparative safety and cost of the different methods was never investigated.

In this state of the evidence Jones J., the trial judge, said: "It is conceded that the first defendants did not provide the "plaintiff with any ladder and that, though he might have "equipped himself with a safety belt provided by them, such a "belt would have been useless as, to the knowledge of the first "defendants, there was no hook or other place to which the "belt could have been attached. It is not suggested that the "first defendants provided any other safety apparatus, and I find "that when they sent the plaintiff to clean the windows of this "club they knew that in the case of the windows in the library "he would have to clean the outside of the window standing on "a sill 6¼ inches wide 27 feet above the ground without any "handhold except the top or bottom of one of the sashes of the "window, and that he might have to move that sash in the course "of cleaning the window, and I find also that they knew that "window sashes do occasionally move and if they move are liable "to cause the hand of the cleaner to be caught between the "two sashes or to be knocked off the sash which he is holding. "The conclusion that I have come to is that the system of work "provided for the plaintiff on this occasion was an unsafe system "of work and that the first defendants were negligent, as is "alleged in para. 3 of the statement of claim."

Now, I do not read this as amounting to a condemnation of the defendants' system on the ground of failure to supply safety belts or ladders which were the issues on which the parties had gone to trial, but as a finding that in the absence of ladders or safety belts the defendants should have done something else. The question at once arises: What precisely should they have done and where was the evidence about it? These cases must be decided upon evidence and the evidence should be confined to the specific allegations in the pleadings so that defendants can know what is the case with which they have to deal before their system is condemned. In the present case they asked for further and better particulars, under para. 3 (*c*) of the statement of claim, "of the allegation that the defendants failed to supply "proper or safe apparatus by specifying what apparatus the "defendants should have supplied but did not." The particulars delivered were as follows: "The plaintiff says that as the defendants failed and neglected to provide or see that any of the "apparatus specified under (*a*), (*b*) and (*c*) of this paragraph "[which related to safety belts and ladders] was provided it was "the duty of the defendants to provide some other proper or safe "apparatus for the purpose but such other apparatus is unknown "to the plaintiff." The nature of this further apparatus was not elucidated by the evidence at the trial nor was it specified by the learned judge. In this connexion it must, however, be noted that in para. 3 (*d*) of the statement of claim there was a general allegation that the defendants had "failed to take any or any "proper precaution for the safety of the plaintiff." Further particulars of this allegation were not asked for.

In the Court of Appeal Denning L.J. upheld the judgment on the ground of failure to use ladders or to ask the owner of the premises to allow the defendants to insert hooks into the brickwork so as to attach a safety belt. Hodson L.J. took the same view and so interpreted the judgment of Jones J. Lloyd-Jacob J., who was the third member of the Court of Appeal, said [12]: "If "the suggestion [is] that alternative dispositions of the window "cleaner (such as those on a ladder, a cradle, or held by a safety "belt) are impracticable, a suggestion which I should not be "taken as accepting, it would appear to be incumbent upon the "employer to ensure that the involuntary closure of the lower "sash during the cleaning operation was impossible. No such "step was taken and the failure of the employers in this respect "is, in my judgment, a failure to take reasonable care."

My Lords, I am quite unable to accept the proposition that it was reasonably practicable for the defendants to insist on being allowed to insert hooks into the brickwork of the building. They would have no right to do so without permission and to insert and properly secure the number of hooks required for the windows of a building of this size would be an undertaking quite beyond what could reasonably be expected of a firm of window cleaners. There was no evidence that any window cleaners had ever undertaken such a task.

With regard to ladders, the evidence was not, in my opinion, sufficient in this case to justify a finding against the defendants based upon their failure to supply ladders for the particular operation upon which the plaintiff was engaged.

Such being the position with regard to the matters pleaded and relied upon in evidence at the trial, can the judgment in favour of the plaintiff be upheld?

My Lords, I have felt considerable doubt on this matter. It is true that in some cases there may be precautions which are so obvious that no evidence is required on the subject, but in a case like the present it is eminently desirable before condemning a system in general use that it should be clearly established by evidence that some other and safer system is reasonably practicable and that its adoption would have obviated the particular accident which has occasioned damage to the plaintiff. The provision of a block or wedge for insertion in defective windows would not, on the plaintiff's evidence, have prevented this accident, since he had not discovered that the window in question was in any way defective and accordingly would have had no occasion to use the wedge, unless he had been instructed that wedges must be used in all windows of this type whether defective or not.

Notwithstanding my doubts I am not prepared to dissent from

[12] [1952] 1 K.B. 141, 153.

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Lord Tucker.

the view that the operation of cleaning this particular type of self-locking window from a sill 6¼ inches wide was so dangerous that it was incumbent upon the defendants to ensure that the closure of the lower sash would be impossible before any employee was allowed to clean such windows from the sill by the handhold method. In fact, the defendants' inspection of the premises had not even revealed the existence of this self-locking device and consequently they had given no special instructions or taken any other step to minimize what should have been a very obvious peril. This was, I think, the basis of the judgment of Lloyd-Jacob J., and on this ground—and this ground alone—I agree that this appeal should be dismissed.

I desire to add that, in my opinion, there is nothing in this case to justify the inference that in all circumstances the cleaning of windows from the sill by the handhold method is always to be condemned as constituting a breach of the duty to take reasonable care to provide a reasonably safe system of work. On the other hand, this case does illustrate the necessity for planning the work on a job of this kind and adopting a system appropriate to the different types of window and sill which may have to be dealt with, having regard to the tendency of windows to stick or "creep" in varying weather conditions even if they may not be "defective" for ordinary purposes.

Appeal dismissed.

Solicitors: *L. Bingham & Co.; Wedlake, Letts & Birds.*

J. C.*

1952
Nov. 19.

1953
Jan. 12.

ATTORNEY-GENERAL FOR CEYLON . . APPELLANT;

AND

KUMARASINGHEGE DON JOHN PERERA . RESPONDENT.

ON APPEAL FROM THE COURT OF CRIMINAL APPEAL OF CEYLON.

Ceylon—Criminal law—Murder—Manslaughter—Provocation—Defence of—Whether retaliatory act reasonably commensurate—Penal Code (Legislative Enactments of Ceylon, 1938, *c.* 15), *s.* 294.

Appeal to Privy Council—Jurisdiction—Criminal matter—Appeal by Crown.

Her Majesty in Council has power to entertain an appeal from any Dominion or Dependency of the Crown in any matter, whether civil or criminal, by whichever party to the proceedings the appeal is brought, unless that right has been expressly renounced.

Regina v. *Bertrand* (1867) L.R. 1 P.C. 520, which has been repeatedly cited with approval, followed and applied.

By section 294 of the Ceylon Penal Code: ". . . Culpable "homicide is not murder if the offender whilst deprived of the "power of self-control by grave and sudden provocation, causes the "death of the person who gave the provocation. . . ." The words "grave" and "sudden" are both relative terms, and must, at least to a great extent, be decided by comparing the nature of the provocation with that of the retaliatory act. It is impossible to determine whether the provocation was grave without at the same time considering the act which resulted from the provocation, and it is wrong to say that, because the Penal Code does not expressly say that the retaliation must bear some relation to the provocation, the contrary is the case.

Accordingly, there had been no misdirection where the trial judge had directed the jury that a defence of provocation could not succeed, and the charge of murder be reduced to culpable homicide not amounting to murder, unless the action of the accused taken by him in consequence of the provocation was reasonably commensurate with the degree of provocation offered to him. In directing the jury that they must ask themselves whether the kind of provocation actually given was the kind of provocation which they as reasonable men would regard as sufficiently grave to mitigate the actual killing, the judge was merely directing the jury as to how they should determine whether the provocation was grave.

Decision of the Court of Criminal Appeal of Ceylon reversed.

APPEAL (No. 14 of 1952), by special leave, by the Attorney-General for Ceylon from a majority judgment of the Court of

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* *Present*: THE LORD CHIEF JUSTICE OF ENGLAND (LORD GODDARD), LORD OAKSEY, LORD REID, LORD ASQUITH OF BISHOPSTONE, and SIR LIONEL LEACH.

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Criminal Appeal of Ceylon (November 29, 1951) which had set aside the conviction of the respondent, Kumarasinghege Don John Perera, of the murder by shooting of a woman named Kumarihamy Samaranayake at Bogahamaditta in the division of Badulla on July 29, 1950. The respondent had been found guilty of murder before Gratiaen J. and a jury (September 3, 1951) and sentenced to death. The jury made a recommendation to mercy.

Kumarihamy was the wife of one Samaranayake, and they lived with five of their children on land adjoining that on which the respondent lived with his family. There had been ill-feeling between the two families, and on July 29, 1950, the respondent shot and killed Kumarihamy and her husband Samaranayake, a married daughter of Samaranayake, and Cyril, one of their children, and wounded two of the other children. Stone throwing by members of the deceased's family at the respondent's house, with accompanying verbal insults, were alleged to have constituted provocation sufficient to reduce the offence to culpable homicide not amounting to murder, within the meaning of section 294 of the Penal Code of Ceylon.

The Court of Criminal Appeal of Ceylon (Nagalingam S.P.J. (President), Gunasekara, Pulle, Swan and de Silva JJ.) by a majority of four to one held that the jury had been misdirected on the law relating to provocation, and they ordered a new trial.

The Crown now appealed.

1952. November 17, 18, 19. *Sir Frank Soskice Q.C.*, *Gahan Q.C.* and *H. A. Wijemanne* for the appellant.

Dingle Foot, *Biden Ashbrooke* and *A. B. Perera* for the respondent.

1952. November 19. Lord Goddard announced that their Lordships would humbly advise Her Majesty that the appeal should be allowed, that the judgment and order of the Court of Criminal Appeal of Ceylon should be set aside, and that the verdict of the jury and the sentence passed thereon should be restored. Their Lordships would give their reasons at a later date.

1953. January 12. The reasons of their Lordships were delivered by LORD GODDARD:—This is an appeal, by special leave, from a decision of the Court of Criminal Appeal of Ceylon delivered on November 29, 1951, which by a majority of four to one allowed an appeal by the respondent against his conviction before

Gratiaen J. and a jury for the murder of a woman named Kumarihamy. The Court of Criminal Appeal set aside the verdict and sentence and ordered a new trial, as they are entitled to do if, in the words of the Court of Criminal Appeal Ordinance establishing the court, " they are of opinion that there was evidence " before the jury upon which the accused might reasonably have " been convicted but for the irregularity upon which the appeal " was allowed." At the conclusion of the argument their Lordships announced that they would humbly advise Her Majesty that the appeal should be allowed and that the judgment and order of the Court of Criminal Appeal should be set aside, and that the verdict of the jury and the sentence passed thereunder should be restored. They now proceed to give their reasons.

The question raised by this appeal is one of considerable importance in the law of Ceylon, for not only does there appear to be a considerable conflict of judicial opinion on the matter among the judges forming the Court of Criminal Appeal, but in the previous case of *Naide* v. *Rex* [1] a judgment was given in direct conflict with that now under appeal. The three judges who first heard this appeal were divided in opinion and the majority doubted the correctness of the decision in *Naide's* case,[1] and accordingly a further hearing was directed by the Chief Justice and a court of five judges was constituted to hear this appeal. The ground on which the appeal was argued before the Court of Criminal Appeal was that the trial judge had wrongly directed the jury that a defence of provocation could not succeed and the charge of murder could not therefore be reduced to culpable homicide not amounting to murder unless the action of the respondent taken by him in consequence of the provocation was reasonably commensurate with the degree of provocation offered to him. The Court of Criminal Appeal held that this was a misdirection, and it is against that decision that this appeal is brought. Various other grounds were raised in the notices of appeal both to the Court of Criminal Appeal and to the Board, but they were not pursued and this particular alleged misdirection was the only matter argued before their Lordships.

A preliminary point, however, was taken by counsel for the respondent, who submitted that the Board had no jurisdiction to entertain an appeal by the Crown in a criminal case. It was submitted that if a decision had once been given in favour of the prisoner no appeal could be brought, reliance being placed on the

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[1] (1951) 53 C.N.L.R. 207.

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doctrine that after an acquittal a prisoner could never be put in peril again. The order of the Court of Criminal Appeal in this case does not amount to an acquittal. It merely sets aside the verdict and sentence and orders a new trial, though no doubt the effect of the order is to restore the prisoner to the position of one who has not yet been tried. It is not on this ground that the Board decided they had jurisdiction to entertain the appeal, but because a series of cases has decided, in their opinion, that Her Majesty in Council has power to entertain an appeal from any Dominion or Dependency of the Crown in any matter, whether civil or criminal, by whichever party to the proceedings the appeal is brought, unless that right has been expressly renounced.

The first case to which their Lordships refer, and which has been repeatedly cited with approval, is *Reg.* v. *Bertrand*.[2] That was an appeal by the Attorney-General for New South Wales on behalf of Her Majesty against an order of the Supreme Court, who had made absolute a rule nisi for a new trial obtained by the respondent who had been convicted of murder. It was objected that the Board ought not to entertain the appeal. The matter was argued before a Board consisting of Sir John Coleridge, Sir William Erle, Sir Edward Vaughan Williams, The Lord Chief Baron and Sir Richard Kindersley. In giving the judgment of the Board, Sir John Coleridge said[3]: "Upon principle, and "reference to the decisions of this Committee, it seems "undeniable that in all cases, criminal as well as civil, arising in "places from which an appeal would lie, and where, either by the "terms of a charter or statute, the authority has not been parted "with, it is the inherent prerogative right, and, on all proper "occasions, the duty, of the Queen in Council to exercise an "appellate jurisdiction, with a view not only to ensure, so far as "may be, the due administration of justice in the individual case, "but also to preserve the due course of procedure generally. "The interest of the Crown, duly considered, is at least as great "in these respects in criminal as in civil cases," and he then proceeded to point out that, for reasons which are nowadays well understood, these appeals would necessarily be rare. In *Reg.* v. *Murphy*,[4] *Bertrand's* case[5] was followed and special leave to appeal was granted to the Crown. In *Reg.* v. *Coote*[6] the Board entertained an appeal against a judgment of the Court of Queen's

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[2] (1867) L.R. 1 P.C. 520.

[3] Ibid. 529–30.

[4] (1868) L.R. 2 P.C. 35.

[5] L.R. 1 P.C. 520.

[6] (1873) L.R. 4 P.C. 599.

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Bench of Quebec, and though that case was argued only by the Crown, the respondent not being represented, their Lordships who heard the case evidently had no doubt as to their power, for they allowed the appeal and ordered that the judgment which had quashed the conviction should be reversed; they affirmed the conviction and directed the court to cause the proper sentence to be passed thereon.

Coming to more recent times, in *Ibrahim* v. *Rex*[7] Lord Sumner, in giving the judgment of the Board, dealt with the grounds on which the Board entertained appeals in criminal cases. He said[8]: " There must be something which, in the particular " case, deprives the accused of the substance of fair trial and the " protection of the law, or which, in general, tends to divert the " due and orderly administration of the law into a new course, " which may be drawn into an evil precedent in future," and for this he cited *Bertrand's* case.[9] In *Nadan* v. *Rex*[10] Lord Cave said[11] " The right [i.e., of appeal] extends (apart from legis- " lation) to judgments in criminal as well as in civil cases," and for this he cited *Bertrand's* case,[12] and that case was again cited in *Ambard* v. *Attorney-General for Trinidad and Tobago*[13] on the point whether the Board had jurisdiction to entertain the appeal. In not one of these cases does there appear to have been any doubt expressed as to the right of the Board to entertain an appeal by the Crown in a criminal case, and their Lordships accordingly held that they had jurisdiction to entertain the appeal. In view of the conflict of authority and judicial opinion existing in Ceylon on the subject-matter of this appeal to which reference has been made above, this is eminently a case fit to be considered by Her Majesty in Council and would seem to fall directly within the concluding words quoted above in Lord Sumner's judgment in *Ibrahim* v. *Rex*.[14]

Turning now to the facts, it is enough to say that the case made at the trial was that ill-feeling had long existed between the respondent and the family of the deceased, and that on the day in question he shot and killed the woman Kumarihamy and other members of her family, and it was sought to reduce the crime from murder to manslaughter by reason of certain provocation consisting of stone-throwing by the woman's family, and threats uttered by them, so that, the respondent said, he was suddenly provoked and at the same time felt serious danger to his life and that he did not know what happened as he had lost control over himself. It is unnecessary for the purposes of this appeal further to set out the facts, as the only question raised was with regard to the direction which the trial judge gave and which has already been stated.

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[7] [1914] A.C. 599; 30 T.L.R. 383.
[8] [1914] A.C. 599, 615.
[9] L.R. 1 P.C. 520.
[10] [1926] A.C. 482; 42 T.L.R. 356.
[11] [1926] A.C. 482, 491.
[12] L.R. 1 P.C. 520.
[13] [1936] A.C. 322; 52 T.L.R. 335; [1936] 1 All E.R. 704.
[14] [1914] A.C. 599, 615.

The Court of Criminal Appeal were at pains to consider whether the law in England relating to homicide and the reduction of a crime from murder to manslaughter was the same as in Ceylon, where the lesser crime is known as culpable homicide not amounting to murder. The court were of opinion that while it was undoubtedly the law in England that the act of retaliation must be reasonably commensurate with the provocation received, this was not the law of Ceylon. The question that falls for decision is one which, in the opinion of their Lordships, depends entirely on the true construction of section 294 of the Penal Code. That code does not provide for any doctrines of English law to be imported into the criminal law of Ceylon. There is no provision similar to that which is found in the Code of Criminal Procedure whereby the English criminal law can be used to fill any gap which may be found to exist in that code. But as the Court of Criminal Appeal set out in their judgment what they conceived to be the English law relating to manslaughter their Lordships feel bound to observe that in one respect the court were in error. They said in reference to English law, " if it is established or " clear from the evidence that though provocation of howsoever " grievous a kind may have been offered, nevertheless, if it could " be shown that the accused caused the death with an intention " to kill, the offence is one of murder and not manslaughter. " This is one of the fundamental differences between our law and " that of England." A little further down in the judgment they said " in the case of murder, there must be an intention to kill, in the case of manslaughter, no such intention can exist." With all respect to the court, that is not the law of England.

In English law there is, no doubt, a distinction between what is generally called involuntary and voluntary manslaughter. The former expression is used to describe that class of manslaughter where the death is caused by gross and culpable negligence, the most common example of which is death caused by the dangerous driving of a motor vehicle. In such a case there is, of course, no intention either to kill or to cause grievous bodily harm, and no question of provocation can arise in such a case. The defence of provocation may arise where a person does intend to kill or inflict grievous bodily harm but his intention to do so arises from sudden passion involving loss of self-control by reason of provocation. An illustration is to be found in the case of a man finding his wife in the act of adultery who kills her or her paramour, and the law has always regarded that, although an intentional act, as amounting only to manslaughter by reason of the provocation received, although no doubt the accused person intended to cause death or grievous bodily harm.

Now section 294 of the Ceylon Penal Code provides that culpable homicide is murder, first, if the act by which the death is caused is done with the intention of causing death, secondly, if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, and there are two other provisions which it is unnecessary to set out. The code then goes on to set out an exception in these terms: " Culpable homicide is not " murder if the offender whilst deprived of the power of self- " control by grave and sudden provocation, causes the death of " the person who gave the provocation, or causes the death of " any other person by mistake or accident." It also provides that " Whether the provocation was grave and sudden enough to " prevent the offence from amounting to murder is a question of " fact." To reduce the crime from murder to manslaughter the offender must show, first, that he was deprived of self-control, and secondly, that that deprivation was caused by provocation which in the opinion of a jury was both grave and sudden. In directing the jury that they must ask themselves whether the kind of provocation actually given was the kind of provocation which they as reasonable men would regard as sufficiently grave to mitigate the actual killing of the woman, in the opinion of their Lordships the judge was merely directing the jury as to how they should determine whether the provocation was grave. The words " grave " and " sudden " are both of them relative terms and must at least to a great extent be decided by comparing the nature of the provocation with that of the retaliatory act. It is impossible to determine whether the provocation was grave without at the same time considering the act which resulted from the provocation, otherwise some quite minor or trivial provocation might be thought to excuse the use of a deadly weapon. A blow with a fist or with the open hand is undoubtedly provocation, and provocation which may cause the sufferer to lose a degree of control, but will not excuse the use of a deadly weapon, and in the opinion of their Lordships it is quite wrong to say that because the code does not in so many words say that the retaliation must bear some relation to the provocation it is true to say that the contrary is the case.

Their Lordships, having considered with care the whole of the summing-up, are of opinion that it was quite impeccable and was in accordance with the law of Ceylon, and for these reasons have tendered to Her Majesty their humble advice that the appeal should be allowed.

Appeal allowed.

Solicitors: *Burchells; T. L. Wilson & Co.*

J. C.*
1953
Jan. 12.

STOOL OF ABINABINA . . . . . APPELLANTS;

AND

CHIEF KOJO ENYIMADU (ON BEHALF OF THE STOOL OF NKASAWURA) . . . RESPONDENTS.

ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL.

West Africa—Land—Claim to declaration of title—Proof by traditional evidence—Point of law not taken below—Exception to rule as to concurrent findings of fact.

On a claim by the appellants for a declaration of their title to certain lands, known as Nkasawura lands, to which the respondents, who had admittedly been in possession of them for many years, claimed to be entitled, the appellants alleged that tribute had been paid to them by the respondents for a number of years in respect of the lands, and that whether or not tribute was proved to have been paid the respondents were only in occupation of the lands by the appellants' leave and licence. The evidence called on both sides was partly traditional—as to rights alleged to have existed beyond living memory—and partly factual as to events within living memory. The trial judge, in summing up his conclusion, in favour of the respondents, said that in claims for a declaration of title the plaintiff "must evidence such positive and "numerous acts within living memory sufficiently frequent and "positive to justify the inference that he is the exclusive owner," and he held that the appellants had failed to satisfy that test.

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* *Present*: LORD NORMAND, LORD REID and LORD COHEN.

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On appeal by the appellants to the West African Court of Appeal the decision of the trial judge was affirmed without qualification, and they made no observations as to the nature of the evidence required to establish title.

On appeal by the appellants on the ground, inter alia, that the trial judge was wrong in holding that sufficient and frequent positive and numerous acts within living memory were necessary to establish title and, inferentially, that such title could not be supported by traditional evidence alone:—

Held, first, that although that point was not taken before the West African Court of Appeal, it involved a substantial substantive point of law and it was plain that no further evidence could have been adduced which would affect it, and the Board would therefore entertain it.

Held, secondly, that the opinion of the trial judge that frequent and positive numerous acts within living memory were essential to justify the inference of exclusive ownership, with which opinion the West African Court of Appeal must be taken to have agreed, was not well founded.

Nchirahene Kojo Ado v. *Buoyemhene Kwadwo Wusu* (1938) 4 W.A.C.A. 96; *Nchirahene Kojo Ado* v. *Buoyemhene Kojo Wusu* (1940) 6 W.A.C.A. 24, and *Kwamina Kuma* v. *Kofi Kuma* (1939) 5 W.A.C.A. 4, applied.

Further, the appellants had satisfied the conditions which brought into operation the exception to the rule as to concurrent findings of fact which, as stated in *Srimati Bibhabati Devi* v. *Kumar Ramendra Narayan Roy* [1946] A.C. 508, 521 (L.R. 73 I.A. 246, 259; 62 T.L.R. 549), is that "in order to obviate the practice, "there must be some . . . violation of some principle of law or "procedure" as therein defined.

Appeal allowed and case remitted for a new trial.

APPEAL (No. 5 of 1951), by special leave, from a judgment of the West African Court of Appeal (June 4, 1947), which affirmed a judgment of the Supreme Court, Divisional Court, Cape Coast, Gold Coast (October 16, 1946).

The following introductory statement is taken from the judgment of the Judicial Committee. The appellants claimed a declaration of their title to a piece of land edged in pink on the plan, exhibit 1 in the proceedings, and also damages for alleged trespass. The respondents alleged that they were entitled to the piece or parcel of land known as Nkasawura lands and edged in green on the same plan, which included part of the land claimed by the appellants. It was admitted that the respondents had been in possession of the Nkasawura lands for many years, but the appellants said that tribute had been paid to them for a number of years in respect of the lands, and that whether or not tribute was proved to have been paid, the appellants were entitled to the disputed lands and the respondents were in occupation of them only by their leave and licence. Before turning to the record of the proceedings their Lordships of the Board thought it advisable to observe that the expression " title " appeared to be used throughout in the sense of the usufructuary right defined by Lord Haldane in *Amodu Tijani* v. *Secretary, Southern Nigeria.*[1]

The proceedings were commenced by writ dated November 21, 1941, the immediate cause of the dispute being that a Mr. R. T. Briscoe had felled trees on the disputed lands pursuant to a licence granted, as the appellants alleged unlawfully, by the respondents. The proceedings were commenced in the Native Tribunal, but on April 27, 1942, were transferred to the Divisional Court, Cape Coast. There were various interlocutory proceedings, and finally the case came before Jackson J. in 1946. He heard the evidence out in full in May, but on September 5, 1946, decided that in view of a then recent decision of the West African Court of Appeal he should have heard the evidence with an assessor, and accordingly he determined to rehear the whole of the evidence in the presence of an assessor. The rehearing was commenced on that date and evidence was called on both sides. It was partly traditional—that was to say, evidence as to rights alleged to have existed beyond time of living memory, and proved by linguists or other members of the various tribes concerned—and partly factual as to actual events occurring within living memory. In the course of the proceedings, after the appellants' evidence had been concluded and in the middle of the respondents' evidence, the judge of his own motion directed that a sketch plan in the handwriting of the judge who had presided at the trial of a land dispute between the appellants' stool and another tribe (hereinafter referred to as the 1902 action) should be put in evidence in order to explain the judgment of Brandford Griffith C.J. in that case. At the conclusion of the evidence and arguments of counsel, after taking the opinion of the assessor, the judge reserved judgment.

He delivered his judgment on October 16, 1946. He referred in the course of it not only to the record in the action in 1902, but also to the proceedings in a case in 1879, *Ahin Doman* v. *Acquassie Essaimin.* Basing himself on what had occurred in those two actions as well as in part on what had taken place at the abortive hearing before him in May, 1946, in the present

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[1] [1921] 2 A.C. 399, 402.

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proceedings, he came to the conclusion that the plaintiffs (by which he must have meant Chief Kwesi Kuma II, then Chief of the appellants, and his witnesses) had been lying in the evidence they gave before him both as to their evidence of tradition and as to their former settlement at Wiosu. He then considered the factual evidence as to tribute and said that it was of a most unsatisfactory nature, and as to credibility he preferred the denials of the defendants to the averments of plaintiffs in that connexion. He did not dwell on the traditional evidence advanced on behalf of the respondents other than to say that he was inclined to a conclusion in favour of the respondents.

He summed up his conclusion in the following words: "In "claims for declaration of title the onus lies upon the plaintiff "to establish his cause upon the strength of his own case and "not upon the weakness of his opponents. In such action he "must evidence such positive and numerous acts within living "memory sufficiently frequent and positive to justify the inference that he is the exclusive owner. This test the plaintiff has "failed signally to satisfy and I do dismiss the claim of the "plaintiff both in respect of the declaration sought for and in "respect of that for damages for trespass."

The appellants appealed to the West African Court of Appeal (Harragin P. (C.J. Gold Coast), Verity (C.J. Nigeria) and Lucie-Smith (C.J. Sierra Leone)), who dismissed the appeal. Their judgment was short and, so far as material, was in these terms:— "It should by this time be more or less universally known that "in a claim of this sort the burden of proof rests heavily on the "claimant. The trial judge found that the appellant had failed "signally to prove his claim and we are in agreement with him "in so finding."

They did not make any observations as to the nature of the evidence required to establish title, but as the Court of Appeal affirmed without qualification the decision of Jackson J., their Lordships of the Board considered that the Court of Appeal must be taken to have agreed with his views on that point.

From that decision the appellants appealed.

1952. December 3, 4. *Dingle Foot* for the appellants. The respondents in fact inhabit the land in dispute, and the issue which has been canvassed in these proceedings is whether they do so, or did so originally, by the leave of the appellants. If the respondents originally went on the land by leave of the appellants it remains the property of the appellants. There are two major

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differences between the law concerning the ownership of land in West Africa, that is, the native customary law, and the law in this country. First, the conception of individual ownership of land is entirely strange to native customary law; instead, there is a form of communal ownership under which all the land is the property of a stool. Secondly, under native customary law there is no such thing as a prescriptive title. Where, as frequently happens, the subjects of one stool occupy lands belonging to another stool, the occupiers sometimes acknowledge the title of the owners by the payment of tribute. Such a payment is not, however, essential, and even if the occupiers have had many years of undisturbed possession during which they have in no way acknowledged the title of the owners, it is still open to the latter to bring an action for a declaration of title. In cases of this description the evidence generally falls under two heads. First, there is the evidence which is generally called the traditional and historical evidence, by which the plaintiffs have to show that they are the original owners and that the defendants are the tenants of their predecessors and came on by their leave. Secondly, there may be evidence of payment of tribute by which the occupiers acknowledge the title. The locus classicus in a case of this sort is *Amodu Tijani* v. *Secretary, Southern Nigeria* [2]; and see also *Adai* v. *Daku.*[3]

There was a good deal of traditional evidence in this case on behalf of the appellants, going back to the origin of the title. Some guidance in relation to traditional evidence is to be found in A History of the Gold Coast and Ashanti, by W. Walton Claridge (1915), p. 3. This case, because of the ruling of the trial judge that in such an action as this the plaintiff must produce evidence of positive and numerous acts within living memory sufficiently frequent and positive to justify the inference that he is the exclusive owner, does raise an extremely important question of principle. That ruling was wrong; it is always open to a plaintiff to establish his title to land by evidence of history and tradition even though the occupants have never paid tribute to him or acknowledged his title. Both courts below failed to have regard to the evidence of history and tradition in this case which, alone, if accepted, was sufficient to establish the appellants' title. Before referring to the authorities in this connexion, it may be observed first that in Sarbah's Fanti Customary Law, 2nd ed.

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[2] [1921] 2 A.C. 399, 401–3.

[3] Redwar's Comments on Gold Coast Ordinances (1909), 231.

(1904), at pp. 65–6, it is said that "it must be borne in mind that "no person can acquire by long uninterrupted possession, an "adverse title against the owner of property, through whom or "whose ancestors possession was first acquired." That passage was referred to with approval in *A. K. Bissoe* v. *Chief Ntah Aithie*[4]; what was contemplated in Sarbah and approved in that case was a state of affairs in which there had been no payment of tribute. In fact in the present case the traditional evidence has been ruled out altogether. There are a number of authorities, including some of this Board, in which very considerable reliance has been placed on traditional evidence. On the trial judge's test in the present case *Eccobang* v. *Hagan*[5] was clearly wrong and should have been decided differently. *Abotche Kponuglo* v. *Adja Kodadja*[6] proceeded on traditional evidence, as did *Nchirahene Kojo Ado* v. *Buoyemhene Kwadwo Wusu.*[7] Although the latter case was decided on estoppel, if it had not been for the estoppel it is clear that the plaintiff, who was out of possession, would have succeeded, although he was relying entirely on traditional evidence. That case came before the court again, when it was said[8]: "The native custom in such a case is clear and "undoubted, namely, that the ultimate ownership remains in the "original owner for all time." That case was not so strong as the present case.

Next, *Kwamina Kuma* v. *Kofi Kuma*,[9] a judgment of this Board, is the most important of all: "In a case such as this, "where the evidence as to title and boundaries rests to such a "large extent upon the witnesses' recollection as to the tradition "to which they speak, it cannot be expected to be as precise and "specific as in a case where documentary evidence is available"; and "even assuming that the defendant and his predecessors "have been to some extent in occupation of parts of the land in "question, for some considerable time without paying tribute to "the plaintiff or his predecessors, such possession in their Lord-"ships' opinion is not conclusive evidence of the defendant's "title." That authority is entirely in the appellants' favour; it was a case which was decided on traditional evidence. *Ohene Tekyi Akyin III* v. *Kobina Abaka II*[10] is again a case in which the plaintiff established his title all the way up on traditional

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[4] Gold Coast L.R., Full Ct. (1926–29), 113, 117.

[5] Sarbah's Gold Coast Fanti Customary Laws, 139.

[6] (1933) 2 W.A.C.A. 24.

[7] (1938) 4 W.A.C.A. 96.

[8] (1940) 6 W.A.C.A. 24, 25.

[9] (1938) 5 W.A.C.A. 4, 6, 7.

[10] (1939) 5 W.A.C.A. 49, 54.

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evidence. *Chief Kweku Dadzie* v. *Atta Kojo and Kojo Appeanya*[11] does not carry the matter very much further. The above authorities which, it is submitted, all point one way, clearly establish two propositions: (a) That original ownership can never be lost by lapse of time; and (b) that the courts are entitled to act on traditional evidence, and should do so in the absence of other satisfactory evidence. Although the West African Court of Appeal did not deal with the point as to traditional evidence, it is open to this Board to entertain it: *Connecticut Fire Insurance Co.* v. *Kavanagh.*[12] Lastly on this point, the case for the respondents states that the concurrent findings of fact as to the appellants' evidence of tradition (it being assumed that the Appeal Court took the same view as the trial judge) and of the payment of tribute by the respondents were correct and ought not to be disturbed. The rule about concurrent findings of fact does not avail the respondents at all in a case of this description; it does not apply where there has been a misdirection on a point of law: *Pope Appliance Corporation* v. *Spanish River Pulp and Paper Mills Ld.*[13]

There are two other matters arising on the proceedings before the trial judge. First, he was wrong in arriving at a conclusion adverse to the appellants based on evidence given at the abortive hearing when the court had sat without an assessor; before arriving at such a conclusion he should have afforded the appellants an opportunity of explaining the evidence at the abortive hearing. Secondly, before saying that the appellants were lying since their evidence did not appear to be consistent with the evidence given by or on behalf of their predecessor in title in the proceedings in 1902 he should have afforded them an opportunity to explain the discrepancy.

Should this appeal be allowed, the appellants cannot ask for judgment in their favour; the case will have to go back.

Khambatta Q.C. and *T. B. W. Ramsay* for the respondents. The trial judge had ample evidence on which to come to his findings, and he quite properly made use of the *Bokitsi Concession* case,[14] where it was said: "I think that, as they are in possession, "the burden of proof is upon the opposers to prove that the land "is theirs"; and see also *Elizabeth Matteer* v. *Ambah Mansah.*[15] The respondents had been in possession of the land for over 100 years, and the trial judge did not accept the appellants' evidence of any tribute having been paid. Reliance is placed on the principle stated in the judgment of this Board in *Omanhene Kweku Dua III* v. *Omanhene Kwamin Tandoh* [16]: "Their Lordships are "clearly of opinion that the facts proved and admitted establish "that the Bekwai people are in possession of the disputed land, "and this fact throws upon the respondent the burden of proving "his title. . . . Tradition, though of great value when supported "by action and facts, becomes of lessened consequence when "brought into collision with a series of definite incidents inexplic-"able if the tradition be regarded as accurate." If the traditional evidence is supported by the facts of the case it has a great bearing, but when it is not—and here, it is submitted, it is contradicted by the facts—it has no bearing. It is on the evidence of tribute that the trial judge preferred the denials of the respondents to the averments of the appellants. "Long undisturbed possession "has been accepted as evidence of title": *Opanin Kwame Adu* v. *Kwasi Kuma.*[17] It is really a matter of the weight of the evidence. This case is within the principle of concurrent findings of fact laid down in *Srimati Bibhabati Devi* v. *Kumar Ramendra Narayan Roy* [18]; the judgments of the courts below were correct.

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[11] (1940) 6 W.A.C.A. 139.

[12] [1892] A.C. 473.

[13] [1929] A.C. 269, 272.

[14] (1902) Sarbah's Fanti L.R. (2nd Sel.) 148, 150.

[15] Gold Coast Judgmts. of Divl. & Full Cts., 1919, 10, 11.

T. B. W. Ramsay followed, and referred to *Kobina Angu* v. *Cudjoe Attah.*[19]

Dingle Foot in reply. The clear construction to put on the judgment of the West African Court of Appeal is that they were entirely approving the judgment of the trial judge—they do not draw a distinction between the different parts of the judgment. They were endorsing what, it is submitted, is the wrong test. The appellants ought to have their costs of their appeal to this Board.

1953. January 12. The judgment of their Lordships was delivered by Lord Cohen, who stated the facts set out above, and continued: Mr. Dingle Foot, on behalf of the appellants, attacked the judgments in the West African courts on two grounds: (1) that the trial judge was wrong in holding that sufficient and frequent positive and numerous acts within living memory were necessary to establish title and, inferentially, that

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[16] (1927) Judgmts. of the J.C. of the P.C. on Appeal from the Gold Coast Colony, 1874–1928, 109, 110.

[17] (1937) 3 W.A.C.A. 240, 241.

[18] [1946] A.C. 508; L.R. 73 I.A. 246; 62 T.L.R. 549.

[19] (1916) Judgmts. of the J.C. of the P.C. on Appeal from the Gold Coast Colony, 1874–1928, 43.

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such title could not be supported by traditional evidence alone; and (2) that the trial judge was not justified in finding that the plaintiff was lying on the ground of discrepancies between his evidence at the trial in September, 1946, and evidence given (*a*) by him at the abortive trial in May, 1946, and (*b*) by his predecessor in title in the 1902 action.

Neither of these points was taken in the West African courts. They could not, of course, have been taken before Jackson J., since they emerged only from his judgment. They could have been taken before the West African Court of Appeal, but their Lordships consider that as they involve substantial points of law, substantive or procedural, and it is plain that no further evidence could have been adduced which would affect the decision of them, the appellants should be allowed to raise them before this Board.

The respondents submitted that they were entitled to judgment since there were concurrent findings of fact in the West African courts which, applying the principles laid down in *Srimati Bibhabati Devi* v. *Kumar Ramendra Narayan Roy*,[1] ought not to be disturbed. But the rule as to concurrent findings is subject to certain exceptions, one of which is clearly stated by Lord Thankerton, delivering the judgment of the Board, as follows [2]: " In order " to obviate the practice, there must be some miscarriage of " justice or violation of some principle of law or procedure." After defining miscarriage of justice, Lord Thankerton continued [2]: " The violation of some principle of law or procedure must be " such an erroneous proposition of law that if that proposition be " corrected the finding cannot stand; or it may be the neglect of " some principle of law or procedure, whose application will have " the same effect."

Their Lordships considered that if Mr. Foot could make good his attack on both points, he would have satisfied the conditions which bring this exception into operation. They therefore proceed to consider whether he has done so.

Their Lordships are satisfied by reference to authorities that the opinion of Jackson J. that frequent and positive numerous acts within living memory are essential to justify the inference of exclusive ownership is not well founded. It will be sufficient to refer to two cases. In *Nchirahene Kojo Ado* v. *Buoyemhene Kwadwo Wusu* [3] the actual decision in the Court of Appeal was on a point of equity, but it is clear from the judgment of the court, that apart from that point the court would have accepted the plaintiff's title solely on the basis of traditional evidence. The opinion thus expressed was not merely a dictum, since the court ultimately on the facts decided the point of equity in favour of the plaintiff and gave judgment in his favour.[4]

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[1] [1946] A.C. 508; L.R. 73 I.A. 246; 62 T.L.R. 549.

[2] [1946] A.C. 508, 521; L.R. 73 I.A. 246, 259.

[3] 4 W.A.C.A. 96.

That traditional evidence may be very relevant is also apparent from the decision of this Board in *Kwamina Kuma* v. *Kofi Kuma*.[5] This case is also of importance because Sir Lancelot Sanderson, delivering the judgment of the Board, pointed out[6] that "even assuming that the defendant and his predecessors have been to some extent in occupation of parts of the land in question, for some considerable time without paying tribute to the plaintiff or his predecessors, such possession . . . is not conclusive evidence of the defendant's title."

Their Lordships are also of opinion that Mr. Foot was right in his criticism of the use made by the trial judge of the evidence given by the plaintiff's predecessor in title in the action in 1902 without giving the plaintiff an opportunity of explaining the supposed discrepancy between his evidence and that of his predecessor. The use for a similar purpose of the plaintiff's own evidence in the abortive trial in May is perhaps more excusable, since plaintiff's counsel may have had a note of that evidence and could thus have dealt with the discrepancy. Even so, their Lordships think that it would have been better had this discrepancy also been put to the witness before it was used against him. Their Lordships are, however, of opinion that the use of the evidence in the proceedings in 1902 in the way indicated above is sufficient in itself to vitiate the finding of the trial judge that the plaintiffs were lying in the evidence they gave before him as to tradition. Their Lordships would add that even if the discrepancy remained unexplained it would hardly justify a finding of deliberate untruth.

Their Lordships are therefore of opinion that Mr. Foot has made good his two propositions and that the order of the courts in West Africa must be discharged. It is, however, plainly a case where their Lordships cannot themselves reach a conclusion on the evidence and there must be a new trial.

Their Lordships will therefore humbly advise Her Majesty that the appeal should be allowed and the orders of the West

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[4] *Nchirahene Kojo Ado* v. *Buoyemhene Kojo Wusu* (1940) 6 W.A.C.A. 24.

[5] 5 W.A.C.A. 4.

[6] Ibid. 7.

African Court of Appeal and of the Divisional Court at Cape Coast be set aside, and that the case be remitted to the said Divisional Court for a new trial. Each party must pay their own costs of the appeals to the West African Court of Appeal and to this Board. The costs of the original trial before the Divisional Court are to abide the result of the new trial.

Solicitors: *A. L. Bryden & Williams; T. L. Wilson & Co.*

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MICHEAL BORYS . . . . APPELLANT;

AND

CANADIAN PACIFIC RAILWAY CO. AND ANOTHER . . . . RESPONDENTS.

[AND CONNECTED APPEAL]

ON APPEAL FROM THE SUPREME COURT OF ALBERTA (APPELLATE DIVISION).

Canada (Alberta)—Mines and minerals—Sale of land—Reservation of "petroleum"—Petroleum and natural gas—Separate substances—"Petroleum" includes gas in solution—Vernacular meaning—Right to work petroleum not specifically reserved—Implied right—No obligation to conserve natural gas.

The appellant was registered in 1947 as the owner of an estate in fee simple of certain property in Alberta which had been acquired by his predecessors in title from the first respondents, who in the original conveyance had reserved to themselves "all coal, petroleum "and valuable stone." In 1949 the first respondents, in reliance on that reservation, leased to the second respondents all petroleum that might be found within, upon or under the land, together with the exclusive right to work, win and carry it away for a period of 10 years. There was under the appellant's property and the lands adjoining it a large reservoir of petroleum which was found in a bed of porous rock underlying the land, which contained at the bottom water, then the petroleum, and on top a layer of gas. The porous rock and the other substances were held in a container which was impervious and shut them off from such of the surrounding land as lay outside it, but within the container itself they could

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* *Present*: Lord Porter, Lord Tucker, Lord Asquith of Bishopstone, Lord Cohen, and the Chief Justice of Canada (the Rt. Hon. T. Rinfret).

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move from place to place, and any withdrawal of water, petroleum or gas from one portion of the container normally resulted in the filling of the vacant space by one of those three substances.

On a claim by the appellant for a declaration that all the natural gas within his land, whether it was found in solution in the petroleum (due to the high pressure and high temperature to which the materials in the container were subjected) or in a free state, belonged to him, and for an injunction restraining the respondents from working the petroleum in such a way as to waste or to interfere with his natural gas:—

Held, first, that there was evidence to justify the concurrent findings of fact of the courts below that petroleum and gas, though each was a combination of the same elements, were separate substances, and accordingly the substance which was found in the form of gas in situ was not the subject of reservation and remained the property of the appellant.

Held, secondly, that as a matter of construction from the facts as given in evidence, the reservation of "petroleum"—a word of which the vernacular, not the scientific, meaning had to be sought—included gas in solution in the liquid as it existed in the earth, and that all the petroleum reserved, including all hydrocarbons in solution or contained in the liquid in the ground, was the property of the respondents.

Dictum of Lord Halsbury L.C. in *Lord Provost and Magistrates of Glasgow* v. *Farie* (1888) 13 App.Cas. 657, 669; 4 T.L.R. 781, approved.

Held, thirdly, that although the right to work the petroleum granted in the lease to the second respondents was a right which had not been specifically reserved in the original conveyance, the absence of a clause giving a right to work did not abrogate or limit the powers of the respondents. Inherently the reservation of a substance, which was of no advantage unless a right to work it was added, made the reservation useless unless that right followed the grant. The true view was that such a reservation necessarily implied the existence of the right of working.

Rowbotham v. *Wilson* (1860) 8 H.L.C. 348, and dictum of Lord Hatherley in *Ramsay* v. *Blair* (1876) 1 App.Cas. 701, 704, applied.

Lastly, inasmuch as the second respondents had a direct grant of the petroleum, whereas the appellant had merely such residual rights as remained in him subject to the grant to the respondents, it could not be held that the respondents were under an obligation to conserve the appellant's gas—a fugacious element—with the consequent denial of their right to recover the petroleum in the usual way. Accordingly, there was no obligation on the respondents to take steps to prevent the egress of the gas or to refrain from connecting the orifice with the oil bed.

Obiter dictum in *Barnard-Argue-Roth-Stearns Oil and Gas Co. Ld.* v. *Farquharson* [1912] A.C. 864, 871; 28 T.L.R. 590, applied.

Judgment of the Supreme Court of Alberta (Appellate Division) affirmed.

CONSOLIDATED APPEALS (Nos. 17 and 18 of 1952) from a judgment of the Appellate Division of the Supreme Court of Alberta (February 6, 1952), which partly reversed and partly affirmed a judgment of the Trial Division of the Supreme Court (Howson C.J.) (May 9, 1951).

The following facts are taken from the judgment of the Judicial Committee:—In the court of first instance the appellant, Micheal Borys, was plaintiff, and the two respondents were defendants, who not only resisted the claim, but also counterclaimed against him and now cross-appealed against portions of the judgment of the Appellate Division.

The appellant owned an estate in fee simple in section 19, Township 50, Range 25 west of the 4th meridian in the Province of Alberta. He acquired it from the Canadian Pacific Railway Company (hereinafter referred to as the C.P.R.). That body, which was registered on September 2, 1900, as owner of the property in question, transferred it to one Simon Borys on December 27, 1906; his title, however, did not appear to have been registered until November 19, 1920. By a series of transactions which it was not necessary to specify, the land was transferred to the present appellant, and on December 18, 1947, he was registered as owner of an estate in fee simple of the property in question.

In the original conveyance the C.P.R. reserved to themselves all coal, petroleum and valuable stone; and on September 21, 1949, in reliance on that reservation, they leased to their fellow respondents, Imperial Oil Ld., all petroleum that might be found within, upon or under the said land together with the exclusive right to work, win and carry away the same for a period of 10 years, subject to the right of renewal.

In terms that lease granted a right which was not specifically reserved in the original conveyance, namely, the right to work the petroleum.

There was in fact under the appellant's property and the lands adjoining it a large reservoir of petroleum, the position and characteristics of which require description. The petroleum, in so far as was material to the present case, was found in a bed of porous rock underlying the appellant's land and the surrounding property, which contained at the bottom water, then the petroleum and on top a layer of gas. The porous rock and the other substances were held in a container which was impervious and shut them off from such of the surrounding land as lay outside it, but within the container itself they could move from place to place, and therefore any withdrawal of water, petroleum or gas from one portion of the container normally resulted in the filling of the vacant space by one of those three substances. As has been stated, the bed stretched beyond the appellant's land, and therefore any such withdrawal might cause the gap to be filled from those portions of the bed which lay outside the appellant's boundaries. On the other hand, the withdrawal of any of the contents might result in a partial filling of the space by the original substances under decreased pressure, or partially in both ways. The substances were fugacious and were not stable within the container, although they could not escape from it. If any of the three substances was withdrawn from a portion of the property which did not belong to the appellant but lay within the same container, and any oil or gas situated in his property thereby filtered from it to the surrounding lands, admittedly he had no remedy. So, also, if any substance was withdrawn from his property, thereby causing any fugacious matter to enter his land, the surrounding owners had no remedy against him. The only safeguard was to be the first to get to work, in which case those who made the recovery became owners of the material which they withdrew from any well which was situated on their property or from which they had authority to draw.

In the present instance the dispute between the parties was as to what was included under the reservation of petroleum, to what extent the respondents were empowered to work it in default of a reservation of a right to do so, and how far they could interfere with the rights of the appellant in things not reserved in the grant to him.

The particular substance of which the appellant claimed to be owner, and to interference with which he objected, was the gas contained in a cap situated on top of the petroleum (which may be called " free gas ") and also any gas which was in solution in the petroleum under his land or which might be withdrawn from under his land.

The problem arose in this way. The material in the container was subjected to high pressure and a high temperature, with the result that what would be gas at a normal surface temperature and at such a pressure as would be met with at ground level became dissolved in the petroleum and was found in solution with it in liquid form. Petroleum, not gas, had been reserved, and the appellant claimed that all the gas on his premises belonged to him whether it were found in solution in the petroleum or in a free state. The respondents, Imperial Oil Ld., who claimed that the reservation of petroleum included the gas in the cap as well as all gas in solution in it, and also included the right to work it, obtained a permit from the State dated November 28, 1949, giving them the right (upon providing security sufficient, in the opinion of the Board of Arbitration set up pursuant to the Rights of Entry Arbitration Act, 1947, to protect the rights and privileges of the appellant) to enter on and use such portions of the appellant's property as might be required for the purpose of drilling for petroleum, subject to compensation.

They then entered upon the land and proceeded to bore for oil, but before they reached the container the appellant, maintaining that their working would remove his gas, whether free or in solution, applied for and obtained an interim injunction inhibiting them from penetrating into the chamber and at the same time brought an action claiming: (a) a declaration that he was owner of the natural gas within his lands; (b) an interlocutory and permanent injunction restraining the respondents from using, removing, wasting, interfering with or otherwise disposing in any manner of that natural gas; (c) alternatively, damages.

At the hearing of the action Howson C.J. found (1) that petroleum and natural gas were two separate substances; (2) that the appellant was the owner of all such gas, whether free or in solution; (3) that the second respondents' workings would interfere with his rights, and granted a permanent injunction. From that judgment the respondents appealed to the Supreme Court of Alberta (O'Connor C.J.A., Frank Ford, Parlee and Clinton Ford JJ.A.; Macdonald J.A. dissenting), who agreed that petroleum and natural gas were two different substances, but held (1) that gas in solution in strata in liquid form in the petroleum was part of the petroleum and was therefore one of the products reserved under the lease; (2) that the reservation of the substance included a right to work it; (3) that all petroleum reserved was the property of the respondents and all gas not included in the reservation was the property of the appellant; and (4) that the respondents were entitled to extract all of the substances belonging to them from the earth even if their action caused interference with and wastage of the gas belonging to the appellant so long as in the operation modern methods were adopted and reasonably used, and the provisions of any relevant statutes and regulations were observed.

Against that decision the appellant appealed to their Lordships' Board, asking that the judgment of the Chief Justice be restored, and both the respondents cross-appealed claiming that

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the free gas contained in the same chamber as the petroleum was part of the petroleum.

1952. July 10, 14, 15, 16, 17, 21, 22 and 23. *G. H. Steer Q.C.* and *H. W. Riley Q.C.* (both of the Canadian Bar) for the appellant.

Geoffrey Cross Q.C., *S. J. Helman Q.C.* (of the Canadian Bar), *Gahan Q.C.* and *J. G. Le Quesne* for the respondents, the Canadian Pacific Railway Co.

H. G. Nolan Q.C., *J. W. Hamilton Q.C.* and *J. F. Barrett* (all of the Canadian Bar) for the respondents, Imperial Oil Ld.

1953. January 12. The judgment of their Lordships was delivered by LORD PORTER, who stated the facts set out above and continued:—When petroleum is sold as a marketable substance no difficulty arises as to the material which is dealt with. The substance by that time has reached the open air and is no longer affected by the pressure and temperature to which it is subjected whilst underground. " Petroleum," says the appellant, " is that well-known commodity which is bought and sold " under that designation, and does not include gas whether in " solution or retained in the cap above it."

Gas not found in the same container as petroleum may, say the respondents, be conceded to be gas and not to be included in the reservation, but the gas in solution is part of the petroleum, and so is the gas which is enclosed with it in the same container. Both substances, as they point out, are hydrocarbons and contain the same elements.

A great deal of evidence tending to either conclusion was given on the hearing of the case, but both courts in Canada, after analysing the evidence, have come to the conclusion that petroleum and gas, though each is a combination of the same elements, are separate substances. In their Lordships' view there was evidence to justify this conclusion, and there are therefore concurrent findings of fact which the Board would not be justified in disturbing. The substance which is found in the form of gas in situ is not, therefore, the subject of reservation and remains the property of the appellant. Gas, however, which exists in solution in the petroleum is a different matter and must be separately dealt with.

When endeavouring to ascertain the meaning which is to be attributed to " petroleum " in the original reservation, it becomes necessary to decide who are the persons whose use of the word is to determine the sense in which it is employed in the relevant document, inasmuch as the chemist and laboratory expert may attribute to it a meaning different from that which the lay mind would adopt. As has been said, the chemical contents of the petroleum and the natural gas found in the field are the same, and regarded scientifically the substances are therefore the same. But a scientific similarity of substance does not establish that the materials are themselves rightly to be described by the same name. The proper approach, says the appellant, is to ascertain the meaning of the word in the mouths of those non-scientific persons who are concerned with its use, such as landowners, business men and engineers, and to be guided by them as to the true construction of the reservation. The vernacular, not the scientific meaning, is, he maintains, the true one, and in support of this contention he calls attention to the observations of Lord Halsbury L.C. in *Lord Provost and Magistrates of Glasgow* v. *Farie*,[1] when he said of mines and minerals that in construing the expression it has to be determined what these words mean in the vernacular of the mining world, the commercial world and landowners at the time when the grant is made. This method of interpretation has been repeated and accepted more than once, and their Lordships agree that where it can be ascertained that a particular vernacular meaning is attributed to words under circumstances similar to those in which the expression to be construed is found, the vernacular meaning must prevail over the scientific. But the distinction is not a rigid one to be applied without regard to the circumstances in which the word is used. It was said by Lord Watson in the same case[2]: " ' Mines ' and " ' minerals ' are not definite terms: they are susceptible of limi- " tation or expansion, according to the intention with which they " are used." In their Lordships' view the same observations are true of the meaning of petroleum. It may vary according to the circumstances in which it is used.

Inasmuch as the respondents claim all the material in liquid form, including gas in solution, and also all gas associated with petrol in the same container, much of the evidence was directed to a distinction between petroleum and gas. But this is a different problem from an inquiry whether gas in solution is included in a reservation of petroleum. No light on this matter is thrown by the recognition, going back as far as 1906, of petroleum and gas as different substances. The question is not whether there are two separate substances, but what is included in each. Except, possibly, one witness, a Dr. Nauss, none dealt specifically with this topic, and with that one exception those who may be thought to do so inferentially do not seem to have directed their minds to a consideration of what is included in a reservation of petroleum in the earth, but merely to have dealt with its meaning when recovered from the mine and put into condition for sale above ground. To discriminate between two substances, found in solution, one from the other, is difficult enough in any case, but when changes of temperature and pressure can alter the respective relative quantities of one and the other, the difficulty is enhanced. In the ground there is a distinction, one is then liquid and the other gaseous, and the liquid may naturally be called petroleum and the gaseous gas. Any other distinction must depend on a purely conventional assumption that liquid at a particular temperature and pressure corresponding more or less to that found on the surface of the earth is petroleum and the rest of the substance is gas. This is a purely chemical formula and in no way elucidates the meaning which the word bears on the lips of landowners, business men or engineers, and except as a convenient conventional formula has no logical basis.

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[1] (1888) 13 App.Cas. 657, 669; 4 T.L.R. 781.

[2] 13 App.Cas. 657, 675.

The difficulty of distinguishing between what is gas and what is petroleum is most easily seen when the ratio of what is fluid in the untapped container to what is gaseous is compared with the ratio of one to the other when the substance is stabilized on the surface. But the difficulty goes deeper, because as the oil is extracted from the reservoir the ratio almost inevitably changes, the gas increasing as the pressure and temperature are reduced. If, then, a question arose as to the right of the appellant to tap and recover his gas, a difficult problem might arise as to how much of the substance belonged to each party. The solution might be that what emerged as liquid was petroleum and what emerged in gaseous form was gas. But the appellant has not tapped the gas, and the question is what substance can the respondents withdraw and to what extent they can make use of the gas whether free or in solution.

The answer, say the respondents, is to be found in a wide interpretation of the word petroleum, which, it is maintained, includes all kinds of hydrocarbons whether in liquid or gaseous form. On the other hand, the appellant contends that gas is gas whether in solution with oil in a liquid form or in a gaseous state. The test is what is liquid and what is gas at the conventional figure of 60° fahr. and 14·65 pressure, i.e., its state at what is a mean temperature and a mean pressure on the surface.

The Chief Justice took the latter view, the Court of Appeal adopted a compromise, viz., the condition of the substance as it emerges from time to time from the reservoir.

This conclusion, says the appellant, is wrong because it depends upon the scientific constitution of the material, and neglects the vernacular meaning.

If non-scientific people had ever had to consider what was included in a reservation of petroleum in a grant of land and the answer had been categorical, this view might well prevail. But as their Lordships have indicated, there is no evidence of such an approach to the problem or, indeed, of any consideration of it. The ordinary man when asked "What is petroleum?" is only concerned with the substance which he can buy or sell after it is recovered and can be delivered as an article of commerce.

Their Lordships cannot find any clear evidence as to what the uninstructed mind would define as petroleum underground either in 1906, when the grant to Mr. Borys was first made, or, indeed, at any later date. One may illustrate the attitude of the layman by quoting the evidence of Mr. Harvie, the Deputy Minister of Lands and Forests for Alberta, who had been entrusted with the task of drafting regulations in respect of mines and minerals. His first statement as to this matter was that, from 1919, and, indeed, possibly from 1905, his understanding was that petroleum was oil, and natural gas was a separate entity, but later on, when asked "What about gas in the ground that is dissolved in "solution," he explained that he was not a technician and that in his evidence he was not dealing with gas in the ground at all. Mr. Droppo, who had been engaged in the petroleum business for many years, gave evidence to the like effect. Similarly, when Mr. O'Connor, another of the appellant's witnesses, said that petroleum was a liquid or crude oil produced from the earth, he threw no light on the question at issue.

In their Lordships' opinion, none of the further non-scientific witnesses called on the appellant's behalf assists his case on this point. On the other hand, Dr. A. W. Nauss, who is a geologist and has had wide experience in oil, explained that in the case of the petroleum in the Leduc field (which is the field under consideration), each barrel of oil recovered from the ground contains 100 cubic feet of gas in solution in the oil, and continued: "When we say 'a gas' we mean those substances which are a "gas at atmospheric pressure and at room temperature." "Gas "in solution," he stated, "is the gas which is dissolved in the "oil," but when it was suggested that it had then ceased to be gas, he replied: "It ceases to look like gas, yes. I would not "say it ceases to be gas."

Dr. Nauss, however, was expressing the opinion of the expert, whereas, as the appellant insists and their Lordships agree, it is in the vernacular use that the true solution is to be found. The chemist may make a distinction between different contents of the liquid substance and resolve it into its constituent parts, but such treatment is purely scientific and in no sense based on the view of the ordinary man. The finding of the trial judge—that gas in solution is not included in a reservation of petroleum in the earth—depends on Dr. Nauss' evidence and not upon the vernacular.

In these circumstances their Lordships, with such assistance as is to be obtained from the facts as given in evidence, must form their own opinion purely as a matter of construction as to the meaning which the word "petroleum" bears when the substance referred to is in situ in a container below ground. In this matter they agree with the observations of the majority in the Supreme Court of Alberta as expressed by Parlee J. in his judgment, when he said: "The trial judge found that petroleum "and natural gas were, by common usage, two different sub-"stances, and that conclusion ought not to be disturbed. I am, "however, with respect, unable to agree with him that the "reservation 'petroleum' did not include gas in solution in "the liquid as it exists in the earth. What was reserved to the "railway company was petroleum in the earth and not a sub-"stance when it reached the surface. It is true that by change "of pressure and temperature, gas is released from solution "when the liquid is brought to the surface but such a "change ought not to affect the original ownership.

"In my opinion, all the petroleum reserved, including all "hydrocarbons in solution or contained in the liquid in the "ground, is the property of the defendants who are entitled to "do as they like with it, subject, of course, to the observance "of all relevant statutory provisions and regulations."

In reaching this conclusion their Lordships have not taken into consideration the view or belief of either Mr. Borys or the Canadian Pacific Railway in 1906 or thereafter as to what was included in the term "petroleum." Probably they had none, and, in any case, it has to be remembered that what has to be sought is the vernacular meaning of the word "petroleum" and not what opinion was held by the parties to the grant, but, indeed, their Lordships would observe that they find it difficult to believe that either landowners, business men or engineers, or, indeed, the staff of the Canadian Pacific Railway or Mr. Borys would at any time have differentiated between the oil and the gas in solution. They would, in the view of the Board, have included in petroleum all the liquid substance in the mine, and this view in no way conflicts with the testimony of the appellant's lay witnesses.

But even if it be conceded that petroleum means a substance formed from a hydrocarbon admixture in its liquid form when in position in its container under ground, the difficulty still arises as to the method by which it is to be recovered and the means by which it is to be brought to the surface. Three elements are normally made use of for this purpose and are, perhaps, well illustrated by a consideration of the conditions subsisting in the premises now under consideration. In the container in question are to be found three layers: (1) on top, the gas cap; (2) the oil with gas in solution; and (3) water. The petroleum is recovered by ensuring that the orifice into the container is neither at too high nor at too low a level. The object is (1) to take advantage of the pressure of the gas cap to push the oil upwards, (2) to assist the oil to mount by the help of the gas in solution, and (3) to make use of the upward surge of the underlying water to push up the intervening petroleum. Each plays its part in the recovery of the liquid oil. Perhaps the most important element is the uprising of the water as the pressure above is released, but all three are essential if the greatest recovery of oil is to be obtained.

The result, however, of tapping the reservoir in this way is to obtain with the oil the gas in solution which is turned into gas on the surface and appropriated by the respondents. A further result is that some of the gas in the gas cap emerges with the petroleum, and the gas-owner is thereby deprived of some of the unreserved property.

Whatever might be the consequence of a reservation of petroleum together with a right to work it, the grant in the present case contains no such right, and, says the appellant, gives no right in the respondents to interfere with the gas in the cap or to deprive him of his property in it. In their Lordships' opinion, the absence of a clause giving a right to work does not abrogate or limit the powers of the respondents. Inherently the

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reservation of a substance, which is of no advantage unless a right to work it is added, makes the reservation useless unless that right follows the grant. The true view is that such a reservation necessarily implies the existence of power to recover it and of the right of working. *Rowbotham* v. *Wilson*[3] states the proposition in plain terms in a case where no right to work was given, and though a right to work is to be found in *Ramsay* v. *Blair*,[4] Lord Hatherley stated[5]: "In the case of the *Duke* "*of Hamilton* v. *Graham*[6] it was clearly pointed out what the "exact right of a proprietor was in respect of a property excepted "from a demise; and as to which therefore all the original "rights of the demising proprietor remained, together with all "the incidents to that property necessary to its working and "enjoyment, that which the owner has reserved to himself being "as much his as other parts of his land of which he has made "no demise whatever."

So far as their Lordships know, the general proposition has never been controverted except in the case of interference with the surface of land which has been granted to another. In such a case there is, in general, no right to let down the surface. In the present case, however, there is no suggestion that the withdrawal of the petroleum or gas will interfere with the surface in any way. But the contention that such a right gives no permission to interfere with the property of others or, in the present instance, to let the free gas escape, requires further consideration and depends upon the legal position of the owner of land in which fugacious matter is found.

The appellant maintained that the gas was his at any rate whilst in situ, and that the true comparison was with the right of support. The respondents, he said, had no more right to pierce the container and allow the gas to escape than the respondents had in *Trinidad Asphalt Company* v. *Ambard*[7] to withdraw the support which their land afforded to the pitch which formed the main ingredient of the appellant's land.

It was not suggested on behalf of the respondents in the present case that there existed any circumstances which might empower them to let down or interfere with the surface of the land except the right to enter upon the appellant's land, to sink a shaft and to recover the petroleum, nor was such a right denied by the appellant. The dispute centred round the contention raised on behalf of the appellant that he must not be deprived of the benefit of his gas, a loss which would follow and be the result of opening the container and allowing the oil to escape.

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[3] (1860) 8 H.L.C. 348.
[4] (1876) 1 App.Cas. 701.
[5] Ibid. 704.
[6] (1871) L.R. 2 Sc. & Div. 166.
[7] [1899] A.C. 594.

To this contention the respondents reply that a distinction has to be drawn between a right to support and a right to property. A long series of decisions, they say, affirms that percolating water may be withdrawn from under the land of an owner by pumping operations on other land adjoining his, and such operations give no redress to the person whose water is tapped: gas is even more fugacious than water and must be treated on the same principles. This proposition is not denied, but does not conclude the matter. The respondents' contention is not that they are entitled to withdraw gas from their own land and to continue to withdraw gas from the same orifice though such gas may have flowed or percolated from under property which is now theirs. Their claim is to use gas which is in situ under the appellant's land or which percolates under it as a result of the normal method of recovering the petroleum by using the gas to assist in drawing it to the surface.

A good deal of authority in the American and Canadian courts has been quoted showing the diverse view entertained in different countries and in the various states in the U.S.A. Some maintain that gases, oils and waters, being fugacious elements, do not belong to the owner of the soil in which they are found, not even when in situ: like wild animals they are only the subject of ownership when reduced into possession. The other view is that so long as they remain in situ they belong to the owner of the soil, but are subject, if one may use the expression, to defeasance in case they move elsewhere before the owner of the soil reduces them into possession.

For the purpose of their decision their Lordships are prepared to assume that the gas whilst in situ is the property of the appellant even though it has not been reduced into possession, but the question is not whose property the gas is, but what means the respondents may use to recover their petroleum. That the method which they are permitted to adopt under the judgment of the Appeal Court is the ordinary way of working today is of some assistance to their argument, despite the fact that in 1906 the tendency was to regard gas as a danger and a nuisance rather than a help. But the main strength of the respondents' case is that they have a direct grant of the petroleum, whereas the appellant has merely such residual rights as remain in him subject to the grant to the respondents. In such circumstances their Lordships are not prepared to hold that the respondents are under an obligation to conserve the appellant's gas with the consequent denial of their right to recover the petroleum in the usual way. Even if it be conceded that the respective rights of the two parties are to work for and recover each his own property (i.e., in the case of the respondents, the petroleum, and in the case of the appellant, the gas), it does not follow that neither can act without the consent of the other and that only by mutual agreement can they work at all.

It may well be that the appellant can recover his own substance by any usual and customary method but cannot prevent the respondents from following a similar course. It is not, however, necessary to come to any conclusion on this matter, since the claim is concerned only with the respondents' right to work and method of working and does not involve any decision as to how the appellant may deal with the gas.

As has been said, no question arises as to a right of support either of the surface or of a lower layer. Their Lordships accordingly refrain from analysing the many cases on subsidence which were quoted to them. The issue is rather as to the right of fortuitous abstraction of gas, leaving the surface as it was. Such a question, in their Lordships' view, gives rise to no consideration of the right of support but only involves the right of taking from an orifice, bored under express power given in that behalf, fugacious material which makes its way to the surface as a result of natural effluxion.

They agree with the Appellate Division that there is no obligation upon the respondents to take steps to prevent its egress or to refrain from connecting the orifice with the oil bed. Such a conclusion confirms the judgment appealed from, subject to one consideration, viz. :—Are the rights of the respondents in any way destroyed or curtailed by the fact that the reservation is a reservation only and does not in terms give a right to work?

It was suggested on the appellant's behalf that *Barnard-Argue-Roth-Stearns Oil and Gas Co. Ld.* v. *Farquharson* [8] was an authority for the proposition not only that petroleum and gas are different substances, but that in working the reserved petroleum the respondents must take care to preserve the appellant's gas. In that case the actual reservation was of springs of oil, and their Lordships are not prepared to decide that "springs of oil" and "petroleum" bear the same meaning, but for the purpose of dealing with the argument they will assume that they do. Nevertheless, though it is true that a distinction is drawn between oil and gas, that distinction was between the liquid substance and the gas as found in the earth. As Lord Atkinson said, in delivering the judgment of the Board[9]: "It is clearly established by the evidence that this gas is not volatilized rock oil, "nor is rock oil condensed natural gas. The gas is not an "exhalation of the oil, *nor is it held in solution by the oil to* "*any considerable extent.*" (The italics are their Lordships'.) "The gas and the oil are in their chemical composition no doubt "both hydrocarbons, but they are distinct and different products, "and it therefore could not be contended successfully, their "Lordships think, that the words 'springs of oil' cover this "natural gas, simply because both are found, in some cases, to "impregnate the same subterranean porous stratum, and that "when this stratum is tapped by a pipe or boring leading to "the surface the gas in its escape to the upper air helps to bring "up to the surface with it some of the oil," and it is clear from the judgment as a whole that the question of the respective right to the gas in solution was not a serious element affecting the ultimate decision. If it had been a different result might have followed. The judgment goes on[10]: "In some instances a "stratum almost entirely impregnated with gas is found "separated by a stratum impervious to both gas and oil from a "stratum almost entirely impregnated with oil. Both the "impregnated strata are then tapped by pipes so arranged that "the gas performs the same function as in the other case, "bringing, or helping to bring, the oil to the surface; but in both "cases, when the pressure under which the gas is pent up in the "earth is relieved, a pump has to be used to pump up the oil."

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[8] [1912] A.C. 864; 28 T.L.R. 590.

From those observations it appears that in some instances the appellant tapped gas sealed in a different container and used it to assist in bringing up the oil. In such a case it may well be said that the oil owners are not recovering their oil in the normal way but drawing Mr. Farquharson's oil from a separate receptacle. The result of merely using the gas in the same container in a normal working of their oil is dealt with at the end of the judgment, where it is said[11]: "The company are clearly entitled to search "and work for oil in these springs of oil, and to win and carry "it away from them, provided they do so in a reasonable

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[9] [1912] A.C. 864, 869.
[10] Ibid. 870.
[11] Ibid. 871.

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"manner, and do as little injury as is practicable. While the "point does not arise in this appeal for decision, their Lordships "think that the company would not be responsible for any "inconvenience or loss which might be caused to the respon- "dent or to the owners of the estate of the grantee in the conduct "of their operations in the manner mentioned": a statement which accords with the decision of the Appellate Court in Alberta, and, in their Lordships' opinion, expresses the true view.

In the circumstances of this case the absence of a clause giving a right to work does not, as their Lordships have intimated, affect the respondents' position. A reservation by a landowner of the mines and minerals or, indeed, in specific terms, of petroleum, is meaningless unless it is accompanied by the right to work and to recover the substance reserved. No question arises as to the right of tenant for life or remainderman. There has been an out-and-out reservation and an out-and-out transfer of the subject of the reservation. Under these conditions, in their Lordships' view, the reservation must imply a right to work.

They are therefore of opinion that the judgment of the Appellate Division is right in all respects and will humbly advise Her Majesty to dismiss the appeal of both parties. There will be no costs of the appeal.

Solicitors: *Charles Russell & Co.; Blake & Redden; Lawrence Jones & Co.*

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Jan. 12.

SCHIFFAHRT-TREUHAND, G.m.b.H., AND OTHERS . . . . APPELLANTS;

AND

HER MAJESTY'S PROCURATOR-GENERAL RESPONDENT.

ON APPEAL FROM THE HIGH COURT OF JUSTICE, PROBATE, DIVORCE AND ADMIRALTY DIVISION (IN PRIZE).

Shipping — Prize — Capture of enemy ports — Partly built vessels — Physical capture a taking in prize—Intention to seize gives jurisdiction—Uncompleted vessel, not capable of floating, a maritime prize—Continuance of right of seizure after unconditional surrender of enemy High Command.

The Prize Court has jurisdiction in every case of seizure or capture of a ship alleged to have belonged to the enemy to decide

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* *Present*: VISCOUNT SIMON, LORD PORTER, LORD NORMAND, and LORD COHEN.

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"according to the course of Admiralty and the law of nations" whether it should be condemned as true and lawful prize. "Prize," in this connexion, means nothing more than "taking" or seizure. "Capture in prize" or "as prize" is not one species of capture. The physical capture of a ship is therefore the same thing as taking her in prize; and she becomes a prize subject to the jurisdiction of the Prize Court from the moment of capture. It is the intention to seize, not the intention to seize in prize, that gives jurisdiction, and the intention of the captor to postpone the date when the Prize Court has jurisdiction is irrelevant.

Accordingly, structures—five partly built vessels belonging to enemy nationals—which were in German ports at the time of the capture of the ports in May, 1945, by or with the co-operation of the British navy, were themselves captured as a result of the capture of the ports; they became "enemy goods seized on enemy territory "by the naval forces of the Crown" (*per* Lord Parker of Waddington in *The Roumanian* [1916] 1 A.C. 124, at p. 138; 32 T.L.R. 98); *The Progress* (1810) 1 Edw. 210; and *The Bellaman, The Agostino Bertani* [1948] 2 All E.R. 679. And the structures, though four of them were not capable of floating at the time when they were captured, were none the less to be regarded as "maritime property "in a maritime town" and as maritime prize, for it would seem to follow, applying the test in Dana's note to Wheaton's International Law, 8th ed., p. 451, that an unfinished ship in course of construction can be a proper subject of prize, at any rate when captured by or with the assistance of naval forces, for its completion makes it available for war-time use.

Further in the interval between the Act of Military Surrender of May 8, 1945, when the German High Command surrendered unconditionally, and the date of the signing of the Declaration of Berlin of June 5, 1945, by which the Governments of the four major allied Powers declared that they had assumed supreme authority with respect to Germany, and which admittedly brought an end to all hostilities between the allied Powers and the German State and terminated the right of seizure of ships and maritime property, there was no necessity to imply a condition that all rights jure belli were to be forgone by the victors, and the allies remained entitled between those two dates—May 8 and June 5—to seize German vessels on the high seas in prize. That conclusion was supported independently by the facts, first, that there was on May 8 no surrender of the German Government or of the Reich itself, which was entitled to appoint new military leaders with instructions to continue the struggle; and secondly, that Germany had been waging war in alliance with Japan and the war with Japan continued after the surrender of the German armed forces, and when war was carried on by partners as allies the unconditional surrender of one could not protect it against the right of seizure so long as active hostilities were continued by a partner unless the victor consented to abrogate his right. Accordingly, two of the five structures which were seized on May 10, two days after the unconditional surrender, were validly seized in prize.

Judgment of Lord Merriman P. sub nom. *The Hermes* [1951] P. 347 affirmed.

Consolidated Appeals (No. 6 of 1952) brought by the respective former German owners of five objects against decrees made by Lord Merriman P. sitting in Prize (May 10, 1951) which dismissed the respective claims of the appellants and pronounced the respective objects to be liable to confiscation by the Crown and condemned them as good and lawful prize.

The following facts are taken from the judgment of the Judicial Committee: The objects affected by the decrees were as follows: (1) Hulls 507 and 508, which were under construction on the stocks at Flensburg in May, 1945, and were not yet ready for launching. As regards 507, her ribs were up and half the plating was completed. As regards 508, the double bottom had been laid and half the ribs were up. The President conveniently referred to them as " the Flensburg structures." The first named appellant claimed those objects as its property.

(2) Numbers 347 and 348, which were still on the stocks at Lübeck. 347 was almost ready for launching, save that she had not been painted. About 70 per cent. of the building of 348 was completed, but the outer sides and decks were only partly riveted. The President referred to those as " the Lübeck " structures." The second appellant company claimed the Lübeck structures as its property.

(3) The motor vessel *Hermes*, which had been launched but was not completely constructed in May, 1945. At the outbreak of the late war she was lying partly built in the Vulkan shipyards in Bremen-Vegesack. As the work could not be completed there owing to the outbreak of war, she was taken, in September, 1942, to Bolnes, near Rotterdam, where she lay, still incomplete, at the time of the allied landings in Normandy. In October, 1944, her owners, the third appellant, decided to have her towed to Emden for completion. While lying in Emden harbour she suffered considerable bomb damage in the course of an air-raid. She did not sink in consequence of that damage, but was lightly grounded as a precautionary measure and holes in her below the water-line were provisionally stopped. She lay in the harbour in Emden damaged, grounded, and still incomplete, in May, 1945. The third appellant admitted that the *Hermes* had acquired the character of a ship, but claimed her as its property.

Proceedings were instituted in the summer of 1947 in the

Prize Court by the Procurator-General for the condemnation of the above as good and lawful prize. By that date the construction of all of them had been completed by the claimants, who had obtained from the occupying powers authority to do so, and the Crown subsequently paid for the work done. In the case of Hull 507, the writ was dated July 22; in the case of 508, the writ was dated August 23; in the case of 347, the writ was dated August 6; in the case of 348, the writ was dated September 1; and in the case of the *Hermes*, the writ was dated August 13. In each case the writ was served by affixing it, or a copy of it, on a portion of the vessel.

The procedure in a British Prize Court was regulated by the Naval Prize Act, 1864, and by Prize Court rules made by Order-in-Council under section 53 of that Act; the rules which applied in these proceedings were the Prize Court Rules, 1939 (S.R. & O. No. 1466 of 1939). By Order XV of the rules, paragraph 2 (*b*), a cause for the condemnation of a ship was to be heard upon evidence provided by affidavits of the officers of the ship concerned in the capture. Accordingly, the Procurator-General presented, in support of his claim, affidavits by naval officers asserting that they were present at the captures of those objects in 1947 and 1948 and that no ship's papers were found on board at the time of the seizure. The affidavits followed a common form, which was presumably prepared beforehand, but it was noteworthy that they did not in some cases state the precise date of capture alleged. For example, in respect of the Flensburg structure 507, the lieutenant who swore the affidavit, on June 30, 1947, merely said that he was present at the capture of 507 "lately taken by His Majesty's ship of war." In the case of Flensburg structure 508, the same lieutenant was more specific and swore, on September 29, 1947, that he was present "at the "capture of the said ship 508 and lately taken by His Majesty's "ship of war *Royal Harold* at Flensburg on August 21, 1947." In the case of the Lübeck structure 347, another lieutenant of the Royal Navy swore, on July 22, 1948, an affidavit in which he said that he was "present at the capture of the said ship "*s.s. Flenderwerke No.* 347 . . . lately taken by His Majesty's "ship of war *Royal Harold.*" And the same lieutenant, in reference to 348, swore, in an affidavit, dated August 26, 1947, that he was present at the capture of *s.s. Flenderwerke No.* 348, "lately taken by His Majesty's ship of war."

The Crown, in putting forward those affidavits in support of their claim, presumably overlooked the proposition that an enemy ship could only be captured as prize in time of war, and when that was pointed out in a letter to the Admiralty Registry written on October 28, 1947, by the German lawyer acting for the second appellant, the German lawyer's letter was very properly placed by the Crown before the President. Finding that the order for condemnation, which he had pronounced on April 29, 1948, against all those structures, except 348, had not been drawn up, the President thereupon cancelled the order which he had made and directed a new hearing. On the rehearing, it was admitted by the Crown that the right to seize in prize in connexion with the late war expired on June 5, 1945, the date of the Berlin Declaration, when the allied powers assumed for the time being powers of government over the whole of Germany. It thus became obvious that the claim made on behalf of the navy that those objects were seized as prize in the summer of 1947 failed, and the seizure hitherto relied on and sworn to was invalid to give the Crown any rights in the Prize Court.

The Procurator-General therefore revised his claim and contended that the occupation or seizure of the ports of Flensburg, Lübeck and Emden constituted ipso facto the seizure of the five structures which were found therein, and that was the basis on which the respondent now reconstructed his case. The writs were amended on February 6, 1951, to claim that the Flensburg structures were " seized and taken as prize by our naval or " military or naval and military forces whilst lying at Flensburg " at the time of the capture of Flensburg on May 10, 1945," and that the Lübeck structures were similarly seized and taken as prize whilst lying at Lübeck at the time of the capture of Lübeck on May 2 and 3, 1945, while in the case of the *Hermes*, the writ was amended to claim that she was " seized and taken " as prize by our naval or military or naval and military forces " whilst lying at Emden at the time of the capture of Emden " on May 6, 1945."

New affidavits were sworn by Vice-Admiral Baillie-Grohman on January 22, 1951, to establish the capture of Flensburg and Lübeck on the dates named, and by Mr. Kent, the assistant-solicitor in the Treasury Solicitor's department, who had the conduct of the proceedings, to establish that the port of Emden was occupied by His Majesty's Canadian army on May 6 and 7, 1945. An affidavit by a naval officer, sworn on February 5, 1951 (the day of the resumed hearing), confirmed that. It stated that the port of Emden was surrendered to the Allied forces on the morning of May 6, 1945; that the port was controlled by the navy with the assistance of military guards, and the port area was cleared of Germans other than those in guarded camps, and was later enclosed in a barbed wire fence; that no German could enter the port precincts without a pass; that it was impossible for the Germans to do anything to their ships or go aboard them. "No "German was permitted to board a German ship or enter the "shipyards without authority."

It was on that revised basis that the issues between the parties were argued in a hearing before the President which began on February 5, 1951. Lord Merriman, in his judgment of May 10, defined the questions for decision as follows: "(I) "Were the ports in question respectively occupied in circum-"stances and at a time which permitted the exercise of any "belligerent rights of prize therein? (II) If the ports were "captured when they were respectively occupied, was their "capture of such a nature as, ipso facto, to effect the capture of "these objects respectively? (III) Were the Lübeck and Flens-"burg structures a proper subject of maritime prize, or were "they merely private property on land and, therefore, protected "from confiscation by virtue of article 46 of The Hague Conven-"tion IV? (IV) In any event, assuming that for any of the "above reasons any one or more of these objects is not liable "to condemnation as good and lawful prize and therefore must "be released, ought they nevertheless to be released to the "Crown and not to the claimants because, as was said in the "letter of July 8, 1949, from the Procurator-General to the "claimants' solicitors, they have in consequence of the assump-"tion of the government of Germany by the Declaration of "June 5, 1945, and of what is the equivalent of German legis-"lation thereunder, become the property of the Crown?"

Lord Merriman P., in the result, held that the objects were liable to confiscation by the Crown, and he condemned them as good and lawful prize.

The appellants appealed.

1952. November 5, 6, 10, 11, 12, 13, 17, 18, 19, 20, 24, 25 and 26. *Kenneth Diplock Q.C.* and *R. I. Threlfall* for the appellants. The Crown based their claim on the theory that the occupation of the ports on the respective dates in May, 1945, constituted ipso facto and without any conscious intention on the part of the captor a seizure in prize of the objects. This case therefore raises three questions of law: (1) Is conscious volition

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or intention on the part of a captor necessary in order to constitute capture or seizure in prize? That is a point which goes to all five cases, and it will be submitted that the evidence shows a deliberate intention not to seize in prize until 1947. (2) Are structures not yet capable of floating, but which, when completed, would become ships, a proper subject-matter of seizure? That point arises in four cases, other than the *Hermes*. (3) Are rights of seizure of the objects exercisable after the date of the unconditional surrender of the German armed forces on May 8, 1945? That point arises only in the case of the two structures at Flensburg, which was occupied on May 10. Total surrender involves cessation of all hostilities. The evidence—the various official documents and the orders and acts of the relevant authorities—shows that there was a deliberate intention not to seize these objects as prize when the ports were occupied; the evidence shows that there was no general intention to capture as prize any ships at all.

Capture and seizure are normally used as interchangeable terms in prize law. The expression "formal seizure" has no meaning in prize law. There are four steps in prize: (i) The capture or seizure. (ii) The bringing in for adjudication; that is to say, bringing the vessel to a convenient port (if not there already) under British control—in this case all German ports would have been convenient ports—and handing it over to the custody of the Admiralty Marshal or other proper officer of the Crown: *The Sudmark (No. 2)*.[1] (iii) The ship's papers are brought into court with an affidavit made by a person present at the capture; or, if no ship's papers are found, an affidavit made by a person present proving their absence. (iv) The issue of the writ. (ii), (iii) and (iv) are procedural steps in a matter which is already within the jurisdiction, and the exclusive jurisdiction, of the Prize Court; those steps are regulated by the Naval Prize Act, 1864, and the Prize Court Rules. Capture or seizure as prize is the crucial step, because (a) it gives jurisdiction to the Prize Court and excludes the jurisdiction of any other court; (b) it fixes the material date for determining the status of the ship or object seized; (c) it creates duties on the part of the captor and of the Crown, who intervene to safeguard the property from avoidable injury or loss; (d) capture creates liabilities on the Crown; there is a liability to condemnation in damages if there were not reasonable grounds of suspicion justifying capture, and the test of

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[1] [1918] A.C. 475; 34 T.L.R. 289.

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suspicion is the subjective test—was the captor in fact suspicious: *The Bernisse; The Elve.*[2] Having regard to the liabilities and responsibilities which accrue ipso facto from the fact of capture or seizure in prize, it seems improbable that a person should wake up and find, without any intention on his part, that he has assumed those responsibilities.

It is submitted that the law as laid down in the eighteenth century was that an intention to seize as prize is essential. It is the foundation, and the only foundation, of the jurisdiction of the Prize Court. That proposition was laid down by Lee C.J. in *Rous* v. *Hassard* in 1750 and cited by Lord Mansfield in *Livingston and Welch* v. *Mackenzie* (1770), which was cited in *Le Caux* v. *Eden.*[3] *Lindo* v. *Rodney*, which appears as a footnote to *Le Caux* v. *Eden*,[4] shows that the jurisdiction of the Prize Court extended to all matters incidental to or arising out of the seizure in prize; that case is the locus classicus on the jurisdiction of the Prize Court. The last of the early cases on jurisdiction is *Faith* v. *Pearson.*[5] Cases which are the converse of the last cited case, and in which the Prize Court did exercise jurisdiction, are *The Huldah*[6] and *The William*,[7] in which it was said that "if it "should . . . come to the knowledge of the court, that a seizure "had been made in the nature of prize, and that no proceedings "had been instituted, it would be the duty of the court to direct "proceedings to be commenced," which illustrates that once a vessel is captured, then irrespective of whether the captor takes any steps himself to bring it into court, the Prize Court has jurisdiction.

Ever since the judgment of Lee C.J. in 1750 an intention to seize as prize has been regarded as an essential element in a seizure and in the jurisdiction of the court. It is in the nature of things seldom that that particular issue arises in cases before the Prize Court, because they come before that court in the ordinary way of a claim by the captor for condemnation, and it has always been assumed by the courts that an intention to seize is a necessary ingredient. The question did arise to a certain extent in *The Roumanian*,[8] where it was argued below that the placing of the cargo under detention did not constitute seizure in prize, and that[9] "in Upton's Maritime Warfare and Prize, with

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[2] [1921] 1 A.C. 458, 463; 37 T.L.R. 193.
[3] (1781) 2 Doug. 594.
[4] Ibid. 612.
[5] (1815) 4 Camp. 357.
[6] (1801) 3 Cr.Rob. 235, 238.
[7] (1802) 4 Cr.Rob. 214, 215.
[8] [1916] 1 A.C. 124; 32 T.L.R. 98.
[9] [1915] P. 26, 31; 31 T.L.R. 111.

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"reference to the Statute of Prize it is said that 'to constitute a "'valid capture there must always be some act done manifesting "'the intention to seize and retain the prize.'" And in the judgment in *The Roumanian* [10] it was said: "It will be observed "that the letter giving notice of the detention of the cargo did "not refer to its detention as prize, . . . it is equally clear that "the letter in question was intended to operate, and must have "been understood by all concerned as intended to operate, as such "a seizure. No other possible intention was suggested. Under "these circumstances their Lordships are of opinion that the "cargo was effectually seized as prize upon the delivery of the "letter." It is apparent that the Privy Council were taking the view that intention to seize in prize was a relevant element and of the essence of seizure in prize. It would appear that the only other modern case which deals with the question of intention is *Anderson* v. *Marten* [11]: "The test whether it was a capture or "not appears to be whether there was an intention to deprive the "owner of his right of property." In law there is a distinction between the right of visit and search and the right of capture, and if it is subsequently decided to capture, it would not date back to the time of the visit and search. Visit and search is not relevant in this case.

Textbook writers do not deal much with this aspect of the matter, but it is submitted that ever since the eighteenth century everyone has assumed that intention was of the essence: see Hyde's International Law Chiefly as Interpreted and Applied by the United States, 1922 ed., Vol. 2, p. 492, where it is said that "there must be some act indicative of such an intention" to capture as prize. It is not suggested that an intention to seize in prize cannot be inferred from the facts, but if there is such an intention there must be evidence of it. In Hall's International Law, 8th ed., p. 544, is the statement: "It is . . . necessary "that the captor shall show an intention to seize and retain his "prize or booty." It would be a strange thing, in view of the duties and responsibilities involved, if a person were held to have seized in prize when he had no intention of doing so.

It is not conceded that the mere hostile capture of a port of itself raises any presumption of seizure of the objects in it in prize. Of course, if it is followed by immediate steps to bring the objects in the port in for adjudication then there may be an

[10] [1916] 1 A.C. 124, 130.

[11] [1907] 2 K.B. 248, 253; 23 T.L.R. 534.

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inference of intention to seize at the date when possession was taken. In his judgment in the present case Lord Merriman P. said [12]: "In the present cases, however, as in *The Bellaman*,[13] it "was not merely a question of visit and search and release, but, "however belatedly, these objects have actually been brought in "for adjudication. In my opinion I ought to follow my own "decision in *The Bellaman* [13] and hold that the hand of the "captor was upon them from the moment when the ports respec- "tively were occupied." *The Bellaman* [13] was a decision that on the facts of that case the President was prepared to draw an inference of capture before the peace treaty came into force; it certainly is not a decision that intention is irrelevant. In his judgment in *The Bellaman* [13] and in the present case the President cited a number of earlier cases which, it is submitted, do not support the decision of law made in this case at any rate, that intention is not a necessary ingredient in capture in prize: *The Progress* [14]; *The Edward and Mary*.[15] Neither of those two cases throws any doubt on the proposition of law that intention is a necessary ingredient in prize capture. Those were cases of prize salvage. With regard to the distinction between capture as prize and prize salvage—a retaking—see *The Svanfos; The Borgila*.[16]

In re The Anichab [17] is no authority for the proposition that intention is not a necessary ingredient in seizure in prize, because there was no question in that case that there was an intention of the captor to seize in prize. *Procurator in Egypt* v. *Deutsches Kohlen Depot Gesellschaft*,[18] also relied on by the President for the same proposition, cannot throw any light on intention, because ex hypothesi it was the intention of the Crown to take possession of and seize those vessels in prize. It is another example of the courts treating intention as a necessary ingredient of a seizure in prize. A conditional intention is not sufficient, and, indeed, that is suggested in *The Sommelsdijk* [19]; in that case Atkin L.J. was emphasizing that it was intention that gave jurisdiction in the Prize Court. That concludes the English cases relied on by the President as showing that intention is not necessary. The German cases to which he referred are clear authority that under Prize law as administered by the German Prize Courts intention is an essential ingredient: *The Bertha Elizabeth*[20]; *The Niobe.*[21] There must, to constitute capture in prize, be in addition to a formal possession an intention to exercise rights of capture in prize; that such an intention can be inferred from the facts of a particular case is not denied, but it must be determined on all the evidence available whether or not such an intention existed at the time of the taking.

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[12] [1951] P. 347, 371.

[13] [1948] 2 All E.R. 679.

[14] (1810) Edw. 210, 217.

[15] (1801) 3 Cr.Rob. 305.

[16] [1919] P. 189; 35 T.L.R. 488.

[17] [1919] P. 329.

[18] [1919] A.C. 291.

[19] [1926] 1 K.B. 84; 23 Ll.L.Rep. 119.

The case may be expressed in three ways. First, as it is understood that the President put it, that any occupation by Her Majesty's forces of any port during a war, if accompanied by an actual exercise of control over what is done in the port, constitutes ipso facto a seizure in prize of everything that is in the port, and even though it is the intention of the commander of the forces not to seize in prize some particular thing or things in the port. If that is the law, then the appellants fail. It is an irrebuttable presumption of law. Secondly, it may be that the law is that it is a presumption of law or fact, capable of being rebutted, that armed forces which occupy an enemy port during a war and exercise actual control over what is done in the port, intend by such occupation to seize in prize everything that is in the port. If that be the right view, then the question arises whether a presumption is capable of being rebutted in the case of any particular thing in the port (a) only by showing that the armed forces or their commander intended not to seize in prize that particular thing, or alternatively, (b) by showing that they did not direct their minds to the question whether or not to seize in prize that particular thing. Thirdly, it is for the captor to prove seizure in prize. The onus therefore lies on him to show a prima facie case of firm possession and intention to seize in prize a particular object. Such an intention may well be inferred from occupation and assumption of control of what is done in the port, but when the Crown has shown by evidence a prima facie capture on a particular date subsequent to the occupation of the port and asks the court to go behind that evidence, the onus lies on the Crown to show an intention to seize the particular object on some other date. If (a) or (b) of the second proposition, or the third proposition, is right, then on the facts of this case the appellants can succeed. In the present cases none of the statutory steps proper to seizure in prize was in fact taken at or immediately after the occupation of the ports: *The Prins Knud.*[22] The inference, until the failure to take the steps has been explained, is that there was no intention at the time of that event to take or seize in prize. Here the inference from the facts and circumstances is that they did not intend to seize in prize. There was an intention not to seize in prize at the moment of the occupation of the ports.

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[20] (1915) Jurisprudence allemande en Matière de Prises maritimes (Fauchille) (1922), 45.

[21] Ibid. 50.

[22] [1942] A.C. 667, 675; 57 T.L.R. 323; [1942] 2 All E.R. 453.

The Prize Court has limited powers of realization and sale, if it is necessary for the protection of the res; and limited powers giving effect to, or allowing, requisition where a case is made out that the res to be requisitioned is "urgently required for use in "connexion with the defence of the realm, the prosecution of "the war, or other matters involving national security": *The Zamora.*[23] In laying down that proposition Lord Parker of Waddington was laying down not a rule of English municipal law, but a general rule of international law applied by the Prize Courts. The Prize Court had no power in international law to order the work of completing the structures to be carried out. The instructions to complete would, indeed, have been a contempt of court if there had been a seizure in prize. In the case of all these structures, what was done to them in 1945 and 1946 was wholly inconsistent with a prior seizure in prize of any of them.

Just as the officials of the Crown on the spot in relation to these particular vessels were plainly treating them as not having been already seized in prize in 1945, so at the highest level the governments of the three Great Powers were at the same time, from August, 1945, to January or February, 1946, dealing with German ships, including constructions, as if they were distributable among the Allies under article 5 of the Berlin Declaration, without any need for Prize Court proceedings. And they were also, so far as the United Kingdom and United States governments were concerned, drawing a clear distinction between German shipping which had already been seized in prize and therefore the subject of prize proceedings, and German shipping which had not been seized in prize. Further, if the Crown is right that the occupation of the ports constituted a seizure of all the maritime property in them, then vessels which were subsequently reserved by the Tripartite Merchant Marine Commission had already been seized in prize and were already within the jurisdiction of the Prize Court.

Those facts, every one of them, and they are cumulative, are consistent with an intention to seize in 1947, and inconsistent with an intention to seize in 1945. It was only because of the letter of the German lawyer that any suggestion was ever made that there had been a seizure in 1945. Unless there is an irrebuttable presumption that the intention was to seize in prize, then it is established, short of such a presumption, that there was no intention to seize in prize in the case of these five structures until 1947, and ex concessis there could be no seizure in prize after June 5, 1945. That concludes the argument on the first question, which goes to all five objects, and if it is right the other questions do not arise. If it is wrong, the second question, which applies to the four structures other than the *Hermes*, is, are structures not yet capable of floating, but which if completed will become ships, a proper subject-matter of seizure in maritime prize?

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[23] [1916] 2 A.C. 77, 106; 32 T.L.R. 436.

Whatever may have been the position before the twentieth century, by today the right to seize the property as prize is limited to ships afloat on the high seas and territorial waters or lying in ports, including in dry-dock, or captured elsewhere on land in the course of pursuit of the enemy seeking to remove ships outside the limits. The other category that can be captured is cargo either on board ship or on land while still retaining the character of cargo. This limitation on the subject-matter of maritime prize is one which has arisen in the process of time, mitigating the general right of capture, whether on land or on sea, which was recognized and exercised in the sixteenth to eighteenth centuries. And it is conceded that at that early date all goods captured on shore by naval forces were the subject-matter of prize. The cases referred to by Lord Mansfield in *Lindo* v. *Rodney* [24] make that clear. Sir William Scott in *The Progress* [25] felt the difficulty of applying prize law to, in that case, ships which were recaptured by the military forces of the Crown. By the end of the eighteenth century a distinction was already being drawn between ships and goods at sea and the categories of things captured on land. The distinction was that as regards the former the Crown allowed the captor to retain the value of his capture, the whole thing, but in the case of captures made on land the Crown allowed the captor to retain the value of the prize only in so far as it fell within certain limited categories of things. By the time of the French wars the policy of the Crown was to discourage capture on land of things falling outside those limited categories. This distinction appears in the three Naval Prize Acts of the Napoleonic wars, the Acts of 1793, 1803 and 1805, and also in *The Thorshaven*, [26] where it was said: "The commissions of privateers do not extend to the "capture of private property upon land; that is a right which is "not granted even to the King's ships."

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[24] 2 Doug. 612, 614.

[25] Edw. 210.

[26] (1809) Edw. 102, 113.

By 1864 there are grounds for supposing that the Crown had abandoned the right to seize property on land in prize other than the property falling within the limited categories: Naval Prize Act, 1864, s. 34. [The relevant provisions of the Naval Prize Acts before the Act of 1864 were reviewed, and reference was made to the note by Dana in his edition of Wheaton, 8th ed. (1866) on the "distinction between enemy's property on sea and "on land," which is set out in *The Roumanian*.[27]] If the captor seizes something which is not proper subject-matter of prize, and brings it into the Prize Court, that court has jurisdiction to decide that it is not condemnable. From 1864 to 1907 there were a number of international conferences, and in the result there were made in 1907 the various Hague Conventions, to which the greater part of the civilized nations of the world were party, and they are generally recognized as stating the international law accepted on that date, and they deal specifically with the right of seizure and requisition of property on land. The relevant articles, 52 and 53, are set out on p. 249 of Pearce Higgins on The Hague Peace Conferences. The point which it is sought to make is that the special exceptions as there made to the limitation on the right to capture—they are exceptions to the general rule that private property must not be confiscated—are in respect of ships and appliances adapted for the transport of persons or things, but that exception does not apply to the structures in the present case because they were not at that date adapted for the transport of persons or things. If it is found under the rules of land warfare that these objects cannot be seized, then it cannot be said that they become the object of maritime prize merely because a naval officer is present when the territory is occupied. There does not appear to be any modern case in which there has been condemned in prize anything which does not fall within the categories of ship or maritime merchandise. In the *Ten Bales of Silk at Port Said*[28] a cargo which had been discharged was held to be the proper subject of maritime capture in prize. Authorities in support of the submission that these constructions were not ships, are: *Polpen Shipping Co.* v. *Commercial Union Assurance Co.*,[29] where it was said: "I do not want to attempt a definition, but

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[27] [1915] P. 26, 39–40; 31 T.L.R. 111.

[28] (1916) 2 Br. & Col.P.C. 247.

[29] [1943] 1 K.B. 161, 167; 59 T.L.R. 106; [1943] 1 All E.R. 162.

"if I had to define 'ship or vessel' I should say that it was any "hollow structure intended to be used in navigation . . . and "capable of free and ordered movement . . . from one place to "another"; and *The Mac*,[30] where Lord Coleridge C.J. accepted the definition of ship cited in Todd's Johnson's Dictionary, namely, "formatum aliquid, in contradistinction from a raft for "the purpose of conveying merchandise, etc., by water, protected "from the water and the weather." To become a ship the structure must have been launched and be capable of floating. In modern cases of seizure on land of anything other than ships the question whether they fall into the category of maritime merchandise in the sense of cargoes actually or constructively afloat has been treated as the only relevant consideration. In any event, the four structures fall outside the category. It must at least have been a matter of doubt in the state in which they were in in May, 1945, whether or not they were the proper subject-matter of seizure in prize.

The third and last point, which applies only to the two structures at Flensburg, is that in any case the right to seize in prize came to an end on May 8, 1945, when the total and unconditional surrender of the German armed forces took effect. The fundamental principle on which that submission is based is that war is the use of force to compel one State to submit to another, and that when the submission is complete the right to use force comes to an end. The application of that fundamental principle to this case can be stated in the form of a syllogism—total surrender puts an end to all acts of hostilities beyond those necessary to ensure its observance; seizure in prize is an act of hostility unnecessary in ensuring the observance of the surrender; therefore total surrender puts an end to seizure in prize. The submission is not capable of elaboration, and reference need only be made to Colombos, Law of Prize, 3rd ed., p. 181, and to Higgins and Colombos, International Law of the Sea, 2nd ed., p. 455, where the relevant passage is in the same terms, and to *The Santa Flavia*[31]; in that case the armistice was on September 3, 1943, and the vessel was captured sometime in 1944, and a French court applied the principle that at the end of hostilities the right to seize in prize came to an end.

Sir Hartley Shawcross Q.C., *C. T. Le Quesne Q.C.* and *Maurice E. C. Rena* for the respondent. It is conceded that after June 5, 1945, belligerent rights in prize could not be exercised. The unconditional surrender on May 8, 1945, it is submitted, left the Crown free to take ships as prize of war. There is no general proposition that an armistice puts an end to a right to seize in prize.

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[30] (1882) 7 P.D. 126, 129.

[31] (1946) Recueil des Decisions du Conseil des Prises, 421.

The first point taken for the appellants—that to constitute a capture in prize there must be an intention to seize in prize—rests on two fallacies: first, it assumes that capture in prize is a distinct form of capture. It is not: it is the only form of maritime capture which is recognized at all. If that is so, there is on principle no difference in the inference which is to be drawn from a taking of a ship whether in port or at sea. To talk of maritime capture in prize is really to introduce a kind of tautologous confusion. There is only one form; it is capture simpliciter. The true principle is that that which is enemy property and which the captor reduces into his possession in order to take it as enemy property thereby becomes a prize of war, and the umbrella of the Prize Court immediately extends to that property the moment it is taken. If a thing is susceptible of capture in prize at all, it is in fact captured in prize the moment it is taken as enemy property. It is that taking which at once brings in the jurisdiction of the Prize Court. The second fallacy is that the argument for the appellants ignores that under the law of nations Prize Courts exist at least as much, and probably more, to protect the interests of neutral and enemy owners than to perfect a title of captors. The right of the Prize Court to exercise jurisdiction arises automatically immediately the hands of the captor are laid on the res. That is a jurisdiction which is not to be ousted, nor are the rights of the claimant, the neutral owners it may be, to be defeated at the will of the captor who chooses to say, " true it is " I captured, but I never intended to capture." Those are the two fallacies which underlie the first part of the argument for the appellants. [Reference was made to *The Sudmark* (*No.* 2),[32] to Hall's International Law, 8th ed., p. 545, and to Wheaton's International Law, 7th ed., p. 308.]

There is no doubt on the facts of this case, no issue, that the ships were captured in fact on the capture of the ports with the additional steps which were taken to exclude any dealing with them by their original owners; and it is not in dispute that they were captured with the intention of keeping them. There is no express English authority, either in the cases or the textbooks, for the proposition that the captor must intend to seize in prize.

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[32] [1918] A.C. 475, 481; 34 T.L.R. 289.

An article on Scottish Prize Cases and Modern Heresies, by T. Baty, in The Law Quarterly Review, Vol. 43, p. 24, at p. 27, states: "Capture consists, not in any subjective intention, but "in the assumption of control by the belligerent officer. As soon "as he controls the vessel he captures, and is thenceforward "responsible for the consequences." It may be that there must be an animus capiendi, but not capiendi in prize. If it is a case of capture on or before June 5, 1945, there can be no capture which is not a capture in prize.

In 1297 King Edward I ordered a ship to be released because, although at the time the matter came before the Admiral it was an enemy ship, it had been captured just before the outbreak of war, and was therefore not lawfully taken: R. G. Marsden, Law and Custom of the Sea, Vol. 1, p. 44. There is not to be found in the early records the taking of a ship "as prize," but just "taking." "Prize" is the result in law of the fact of the capture of enemy maritime property in war: *Le Caux* v. *Eden*,[33] where it was said: "The principle is, that the question 'prize or not "'prize,' and the consequences of it, are conusable solely in the "Admiralty Court; the true reason of which is, that the prizes "are acquisitions jure belli, and the jus belli is to be determined "by the law of nations, and not by the particular municipal law "of any country." See also *Faith* v. *Pearson*,[34] *The William*[35] and *The Two Friends*.[36] With regard to the time at which property was transferred, adjudication confers the title, which dates back to the moment of capture: Oppenheim's International Law, 7th ed., Vol. 2, p. 474, para. 185, states that "seizure of "private enemy vessels may be described as parallel to occupa-"tion of enemy territory in land warfare," and in *The Odessa; The Woolston*[37] it was said: "The effect of a condemnation is "to divest the enemy subject of his ownership as from the date "of the seizure." Once the hand of the captor is laid on the res the jurisdiction of the Prize Court is attracted: *The Zamora*.[38] The capture, the taking, in this sense, consists only in compelling the vessel to conform to the captor's will, and doing it with a view to taking her as an enemy ship—not with a view to assisting her in navigating docks and so on: *The Pellworm*[39]: "submission

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[33] 2 Doug. 594, 609.
[34] 4 Camp. 357, 358.
[35] 4 Cr.Rob. 214, 215.
[36] (1799) 1 Cr.Rob. 271, 283.
[37] [1916] 1 A.C. 145, 153; 32 T.L.R. 103.
[38] [1916] P. 27, 36; 31 T.L.R. 513.
[39] [1922] 1 A.C. 292, 302; 38 T.L.R. 338; 3 B. & C.P.C. 1053.

"must be adjudged by action or by abstention from action; it "cannot depend on mere intention . . ."

If the captor needed to use the vessel for some urgent purpose, and he was the judge of necessity, he could do it. All the old cases show that it is enough that the captor has done something which the merchantman has accepted as obliging him to obey the captor's directions. There is not a word in any of those cases as to the necessity for any specific intention to seize in prize. The high-water mark of authority for the view that a subjective intention is a necessary element is really an early American case and, less clearly, two English cases. The American case is *The Grotius*,[40] the sidenote to which reads: "In order to constitute "a capture, some act should be done indicative of an intention "to seize and to retain as prize. It is sufficient if such intention "is fairly to be inferred from the conduct of the captor." That case does not appear to have been cited in any English case as authority for the proposition that intention is necessary. With regard to the sidenote to that report, it is submitted that the question in issue in that case was simply whether there was any intention to take at all; all that that case really decided on its facts was that where there was on the one hand an allegation that there was never a taking of the ship at all, but that somebody was put aboard simply to be taken as a passenger, and on the other hand an assertion of taking, the court had to be sure that what was done was intended to be done as part of a taking. It would be difficult to reach any other conclusion than that arrived at in the face of facts of that kind. The issue was the fact: was that ship taken or not? and it does not support the contention for the appellants here. The first of the two English cases above referred to was *Anderson* v. *Marten*,[41] where it was said that "the test whether it was a capture or not appears to be whether "there was an intention to deprive the owner of his right of "property." That is the only intention referred to in that case. The other English case on intention is *The Oscar II*,[42] but all that that case really decided was that there had not been until the telegram was sent a capture or a deditio. There is not one case inconsistent with the submission for the Crown on the question of intention.

Supposing that the Crown did not bring the case into the Prize Court, but kept the ship, which might be owned by a neutral, the court could of its own motion start proceedings, and the neutral owner might do so; does he have to prove what the intention was? It is enough to ask that to reject it; he has only to say, "my ship has been captured," and the court would have said that the ship was in prize. *The Panariellos*[43] shows (a) that effective control is enough to constitute a seizure, and (b) that the so-called practice of formal seizure after the date of effective control does not prevent the court from deciding when in fact effective control was first exercised and in selecting that date as the date of the seizure for the purposes of the Prize Court: on this point see also *The Feliciana*[44] and *The Eden Hall.*[45] If it is right that capture consists solely in taking control to the exclusion of the owner—in asserting physical authority—then such physical authority was asserted in this case. The only detention which any system recognizes in maritime law is detention in prize.

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[40] (1815) 9 Cranch 368.

[41] [1907] 2 K.B. 248, 253; 23 T.L.R. 534.

[42] (1918) Hull's Digest of Cases Decided in British Prize Courts (1927 ed.) 98.

[He was stopped on the question of "intention."]

On the second point—the contention for the appellants that four of the structures were not maritime res because they had not been launched—the first question is whether it is really right to say that these things were not ships for this purpose. It is not of much assistance going into cases on what amounts to a ship, but in *Ex parte Hodgkin; In re Softley*[46] it was said: "At "this time the ship was still on the building slip; her hull was "incomplete," and "whether this thing was a ship or not, "although I know not by what other name it could be called . . ." What other name would be reasonable in the present case? Normally people would regard these structures as ships. It is a question of degree. Further, it is not necessary for the Crown to say that these were ships, because the right to seize in prize is very much wider. But these really were ships in the old prize law sense, and were the proper subject of maritime prize. At any rate, a thing which is in its nature maritime and which is found in a port is a subject of seizure. That is as far as the Crown need go, and it is not sought to extend the principle. "Story "says that the ordinary prize jurisdiction of the Admiralty "extends to all captures made on the sea 'whether the property "'so captured be goods, ships, or mere choses in action' (see "Story's Notes on the Principles and Practice of Prize Courts "(Pratt's ed.), p. 28)": *The Frederik VIII.*[47] Sir Samuel

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[43] (1916) 32 T.L.R. 459; 2 Br. & Col.P.C. 47.

[44] (1915) 3 Ll.P.C. 418, 423.

[45] [1916] P. 78.

[46] (1875) L.R. 20 Eq.Cas. 746, 748, 756.

[47] [1917] P. 43, 45; 33 T.L.R. 133.

Evans P. in that case must be taken to have approved the whole passage in Story; if he had not he would have said so. All that the Crown need say in the present case is that these structures were things of a maritime nature captured in a maritime place. As was said in *The Roumanian* [48]: "The test of afloat or ashore is "no infallible test as to whether goods can or cannot be lawfully "seized as maritime prize. It is perfectly clear, for instance, "that enemy goods seized on enemy territory by the naval forces "of the Crown may lawfully be condemned as prize." [Reference was also made to *In re Certain Craft Captured on the Victoria Nyanza*.[49]] It is beyond argument that in Lord Stowell's time this kind of property would have been a subject of seizure, and it is therefore for the appellants to show that the law has altered since that time. There is nothing to show that it has. These objects were ships in the broad sense, but in any event they were beyond argument maritime things in a maritime port, and all such things are capable of seizure in prize.

Coming to the third point, there is no general rule of international law that, although involving a suspension of hostilities, an armistice necessitates a suspension of the exercise of the rights of prize. The short answer is that the suspension of hostilities in the absence of contractual agreement between the States concerned does not put an end to the right to seize in prize. There are authorities both ways: Oppenheim's International Law, 7th ed., Vol. 2, p. 546, and para. 235; Hall's International Law, 8th ed., p. 662: "The legality of captures at sea during an "armistice depends on its terms"; Wheaton's International Law, 7th ed., p. 561: "The right of visitation can be exercised during "an armistice, and even until ratification of a treaty of peace." Those three views are contrary to the view expressed in Halleck's International Law (1908), Vol. 2, p. 349. [On the method of putting an end to hostilities by way of unconditional surrender reference was made to Lauterpacht's edition of Oppenheim's International Law, 7th ed., Vol. 2, p. 552, para. 237a, and p. 602, para. 265a.] That being the correct view to be taken of unconditional surrender, it is unconditional; it imposes no restrictions on the legal rights of the victors. Further, active hostilities were still continuing against Germany's ally, Japan, and it is unthinkable that whilst one of two co-belligerents continues the war the other, by unconditional surrender, can impose on its enemy the inability to seize ships or other war material in order to continue the prosecution of the war against the remaining partner.

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[48] [1916] 1 A.C. 124, 138; 32 T.L.R. 98.

[49] [1919] P. 83, 85; 35 T.L.R. 117.

The submission is, therefore, that unconditional surrender of this kind, where the war is going on against the other party, does not affect the exercise of rights of war such as visit and search and capture. That, on the whole, appears to be the consensus of opinion of the foreign Prize Courts which have considered the matter: *The Santa Flavia* [50]; *In re Petrol Driven Towing Launch*, a decision of the Prize Court of Malta [51]; *Ministero della Marina* v. *Ralli Brothers* [52]; *The Paolina* [53]; *The Capo Lena* [54]; *The Abeille* [55] and *The Goulfar.*[56]

Summarizing the argument on the three points: first, the capture of ports in the circumstances indicated by the signals in this case involved the physical taking of everything within the ports which was the subject-matter of maritime prize. It was a closing of the net. The cases show that that was an effective capture. In the present case the taking of these ships by the capture of the ports did not purport to be, and was wholly inconsistent with, a taking for use only by requisition. The only form of appropriation recognized jure belli is a taking in prize. Once the net has closed around the ports the hand of the captor was on all maritime things within the port and the jurisdiction of the Prize Court either to condemn or to order release or to award damages arose. [Reference was made to *The Proton.*[57]] Secondly, the capture of the ports closed the net round everything in the ports which was the proper subject-matter of maritime prize; it is sufficient for the purposes of this case to rely on the rule as enunciated by Lord Stowell in *The Progress* [58]: "Maritime "property in a maritime town." These objects, if they were not ships, and it is submitted that they were, were certainly maritime things in a maritime port, and all such property in such a place captured by naval or by joint forces is the proper subject of prize. Lastly, rights of prize continue to be exercisable over maritime things in a maritime port until the victorious Powers themselves come to exercise another control over those things in a new right, not jure belli, but as the sovereign power of Germany.

C. T. Le Quesne Q.C. followed. In the unreported decision

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[50] Annual Digest and Reports of Public International Law Cases, 1946 vol., 406.

[51] May 24, 1946 (unreported).

[52] Annual Digest and Reports of Public International Law Cases, 1943–5 vol., 466.

[53] Ibid. 467 (Note).

[54] Ibid. 460.

[55] Ibid. 414.

[56] Ibid. 469.

[57] (1916) 2 Br. & Col.P.C. 107.

[58] Edw. 210, 214.

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1953

SCHIFFAHRT-TREUHAND, G.m.b.H. v. HER MAJESTY'S PROCURATOR-GENERAL.

of the Maltese Prize Court, which is in favour of the appellants here, the judge referred to *The Oscar II*,[59] which is undoubtedly the case referred to in Hull's Digest of Cases, because he used the exact words of Hull. *The Oscar II* [59] was decided by Lord Sterndale, and it is submitted that the only thing he had to determine was at what date the hand of the captor was laid on that particular parcel of goods. Lord Sterndale said that he was following what was said by Lord Parker in *The Roumanian* [60]; but Lord Parker did not say, and cannot have meant to say, that capture by itself is insufficient for the purpose of giving jurisdiction to the Prize Court if at the date of capture there was not already an existing intention to put the captured ship into the Prize Court. [Reference was made to *The Panariellos*.[61]]

Diplock Q.C. in reply. There appears to be no modern case, either English or foreign, where a Prize Court has condemned anything which did not come within the category of ships or cargoes actually or constructively afloat. "Maritime things" is an expression which requires definition. In the case of a ship the line of demarcation must in any event be when the object is capable of floating; until it is, it is not a ship. Whether a thing is maritime property or not is not the crucial question in determining whether it can be seized or not. The test of convertibility to warlike use is no longer an accurate test.

So far as armistice is concerned, there is this vital distinction —essential in this case—to be drawn between armistice and unconditional surrender, that an armistice is a temporary cessation of hostilities; it gives to each party a right to resume hostilities either at the end of a fixed time or on notice to the other side. So far as the authorities go, there are no relevant English cases. So far as the textbook writers are concerned it would be right to say that there is not a unanimity of view, some saying that in general terms right of seizure in prize goes unless expressly reserved, others that the right to seize in prize as a means of enforcing blockade prima facie continues. There is no right to take in prize after unconditional surrender. Reliance is placed on the following passage from Oppenheim's International Law, 7th ed., p. 553, para. 237a: In the case of unconditional surrender "there is no legal limit set to the victor's freedom of action— "save the implied obligation not to resume hostilities if all his "conditions and orders are complied with." The taking of enemy property is a hostility; if there is an unconditional surrender, that puts an end to hostilities.

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[59] Hull's Digest of Cases Decided in British Prize Courts, 98.

[60] [1915] P. 26; 31 T.L.R. 111.

[61] 32 T.L.R. 459; 2 Br. & Col.P.C. 47.

With regard to intention, the Board appears to have formed the preliminary view that if a capture of maritime property in wartime is established it is unnecessary to show that it was intended to capture it as prize. Before that proposition can apply a capture must be shown, and the Oxford Dictionary defines "capture" as "The act of taking forcibly, or by stratagem, or "of being thus taken." To amount to a taking there must first be shown some actual interference with the dominion of the owner over his property. It does not suffice to show that the Crown could have interfered with it, but in fact did not do so. And here, as regards the Flensburg and Lübeck structures, there is no evidence of any interference by the Crown with the acts of dominion over the property by the owners. What happened after does not matter for the purposes of this case. In the absence of such interference there is no evidence of capture of these particular things—a forcible taking or seizing. It is necessarily a question of fact in each particular case. The assumption that the exercise of some degree of control necessarily involves capture is erroneous. The allowing of the German owners to go on with the construction of the ships is inconsistent with capture. So far as the *Hermes* is concerned, no act of dominion was exercised by the Crown until 1947. The exercise of the right of visitation does not amount to capture of ship or cargo, or to seizure in prize at all; and in the present case the acts were far short of the exercise of the right of visitation. Everything that was done here was perfectly regular on the basis that what happened in 1947 was the capture, and in 1945 the normal security measures which would be taken and which did not amount to a seizure or forcible taking of the res.

1953. January 12. The judgment of their Lordships was delivered by VISCOUNT SIMON, who stated the facts set out above and continued: The issues in the appeal are complicated and have been admirably presented and argued before the Board by counsel on either side. Mr. Diplock discussed the questions involved in a different order from that defined by the President and formulated them thus:—(a) Is conscious volition or intention on the part of a captor necessary to constitute capture or seizure in prize? (b) Are structures not capable of floating, such as the Lübeck and Flensburg structures, capable in their nature of being maritime prize? He conceded that the *Hermes* was a "ship." (c) Did rights of seizure in prize continue after May 8, 1945, when the act of military surrender was signed at Berlin on behalf of the German High Command? The contention that no seizure in prize was possible after this date affects only Hull 507 and Hull 508, since Flensburg was captured on May 10, 1945.

Their Lordships find it convenient to deal with the issues raised in the order formulated by Mr. Diplock.

(a) The form in which the first question is framed implies that the captor who has laid hands on an enemy ship has an option to decide whether to claim her as a prize as from the date of seizure or to use her for his own purposes in the first place with a right to seize her as a prize at a later date. There can be no doubt that this was the assumption made by the Combined Chiefs of Staff of the Allies in reference to captured German ships before the surrender of Germany. There is in evidence an affidavit, made on January 18, 1951, in these proceedings by Mr. H. D. Samuel, an assistant secretary in the Admiralty and the head of the naval law branch of the secretary's department, which paraphrases the signals sent in cypher on this subject as follows:—

"4. I have read the signals and can say that in December, "1944, the Combined Chiefs of Staff agreed on the following "policies concerning enemy ships captured before the surrender "of Germany.

"(a) For operational purposes Supreme Commanders were to "have first claim on enemy ships taken in ports within their "commands just as they had on ex-Allied ships.

"(b) When Supreme Commanders had no further need for "Military operations of enemy merchant ships captured or found "in ports within their commands these were to be transferred to "representatives of the Combined Shipping Adjustments Board. "Arrangements for manning and operation would then be made "within the combined shipping pool, but such ships were to "remain subject to all claims including salvage claims and were "to be accounted for in the final shipping settlement.

"5. On May 14, 1945, instructions were sent by the "Combined Chiefs of Staff to General Eisenhower that unless "otherwise directed the policies referred to in paragraph 4 hereof "should be applied to all German shipping, captured by forces "under General Eisenhower's command in German ports before "the surrender or declaration of defeat of Germany.

"6. Further instructions were given on this date to General "Eisenhower that captured ships were to be seized as prize "except for fishing-craft, inland water craft and vessels needed "for local service with German crews. Seizure was to be effected "in Bremen and Bremerhaven by the United States Navy and "in other ports by the Royal Navy.

"7. Further instructions were to follow regarding the "treatment of shipping falling into the hands of the Allied "Expeditionary Force upon surrender or declaration of defeat. "On June 8, 1945, instructions were sent by the Admiralty to "the naval authorities in Germany referring to the seizure of "German ships in prize. A paraphrase of this signal is annexed "to this affidavit and is marked 'A.'"

The Exhibit A is as follows:—

"Date 8.6.45

"To:

"Flag Officer-in-Charge, Hamburg.
"Flag Officer-in-Charge, Kiel.
"Flag Officer, Norway.
"Flag Officer, Western Germany.
"Flag Officer, Denmark.

"Info.A.N.C.X.F.

"C.-in-C. Rosyth.
"F.O.I.C. Humber.
"N.O.I.C. Methil.

"From Admiralty.

"Deferred.

"Subject German ships seized in prize. Vessels are if "possible to be seized in ports of Germany or in ports occupied "recently.

"Vessels to be accompanied to U.K. with affidavits of seizure "in hands of officer commanding armed guard. These affidavits "to be delivered to N.O.I.C. at arrival port. At such port "affidavit to be delivered by N.O.I.C. to customs officer. Vessels "not to be seized until at point of departure for U.K. by reason "uncertainty regarding arrangements for refitting."

(The Flag Officer-in-Charge for the Kiel area, which included Flensburg and Lübeck, was Vice-Admiral Baillie-Grohman.)

These "further instructions" are obviously given with a view to complying with the procedure called for by section 16 of the Naval Prize Act, 1864. The explanation of the last sentence of Exhibit A is that it was desirable to send a vessel seized as prize to the port of this country where she could be conveniently "refitted," i.e., overhauled.

The view upon which these directions were framed was therefore that when the Allies took possession of German ports and thereby acquired control of enemy merchant shipping in them, a practical question would arise as to what was to be done with the shipping. On the one hand, the Allies might be glad to use it "for "operational purposes," for example, to move troops or to bring in supplies. The fact that merchant ships and transports belonging to the Allies had been extensively sunk by German submarines made it all the more necessary to avail themselves of means of sea-transport which fell into their hands.

On the other hand, the Allied navies might be ambitious of taking the German shipping as prize and thereby contributing to the fund which would be available for prize-bounty. Having, as they conceived, these two alternatives before them, the Joint Chiefs of Staff adopted the policy of recognizing that the first claim on the shipping was for operational use and so informed General Eisenhower and others concerned. But they contemplated that German shipping seized in German ports should in the end be dealt with so as to contribute to the prize funds of the victorious navies. Thus the plan was to use the seized ships in necessary operations as long as the war was going on without being handicapped by the formalities of a Prize Court, but it was contemplated that when Germany surrendered there would still be time to bring the vessels before the Prize Court.

Those who advised this plan and gave these instructions laboured under the misapprehension that proceedings based on capture in prize, which invoked the jurisdiction of the Prize Court, could be taken after the surrender of Germany. This, in their Lordships' opinion, was an error. And it is now conceded by the Crown that no seizure in prize could validly take place after June 5, 1945.

Mr. Diplock, relying on the above assumption on which the first question is based and on the view set out above of the Chiefs of Staff, contended that the instructions given by the latter to seize in prize at a later date demonstrated that there had been no seizure in prize at the time of the capture of the ports, and that there could therefore have been no intention on the part of the captors to seize the objects in prize when the ports were captured.

This argument, however, is met, in their Lordships' opinion, by considering what is the nature of a prize-capture over which the Prize Court has jurisdiction.

The British Prize Court, constituted at the beginning of any war in which this country is engaged involving naval action, is set up by a Commission under the Great Seal addressed by the Crown to the Admiralty. The Commission under which the Prize Court sat in connexion with the last war was issued under an Order in Council dated September 5, 1939, which recited that a state of war existed between this country and the German Reich "so that His Majesty's fleets, ships, and aircraft may lawfully "seize all ships, vessels, aircraft and goods belonging to the said "German Reich or to the citizens and subjects thereof, or other "persons inhabiting within any of the countries, territories, or "dominions of the said German Reich, and bring the same to "judgment in any such courts as shall be duly commissioned to "take cognizance thereof," and the Commission authorized "the "Commissioners for executing the Office of Lord High Admiral "to will and require His Majesty's High Court of Justice and "the judges thereof for the time being to take cognizance of and "judicially proceed upon all manner of captures, recaptures, "seizures, prizes and reprisals of all ships, vessels, aircraft and "goods that are or shall be taken, and to hear and determine the "same, and according to the course of admiralty and the law of "nations and the statutes, rules, and regulations for the time "being in force in that behalf, to adjudge and condemn all such "ships, vessels, aircraft, and goods as shall belong to the said "German Reich or to the citizens or subjects thereof, or to any "other persons inhabiting within any of the countries, territories, "or dominions of the said German Reich or be otherwise "condemnable as prize." The Admiralty then executed this Commission by issuing a warrant to the High Court requiring the judges to act accordingly.

It is plain, therefore, that the Prize Court has jurisdiction in every case of seizure or capture of a ship alleged to have belonged to the enemy and to decide "according to the course of admiralty "and the law of nations" whether it should be condemned as true and lawful prize. "Prize," in this connexion, means nothing more than "taking" or seizure. "Captured in prize" or "as prize" is not one species of capture. If a ship is captured she thereby becomes a prize subject to the jurisdiction of the Prize Court. The French equivalent for our "Prize Court" is Cours des Prises, and "prise" means "taking." Littré defines "prise" as "action de prendre un navire." The jurisdiction of United States courts in prize cases equally extends to all captures, as explained by Judge Story in Notes on the Principles and Practice of Prize Courts. It was pointed out in the course of the argument that, according to Murray's Oxford Dictionary, the English word "prize" in this sense, though spelt and pronounced in the same way as the word for a reward, is a distinct word and means simply a capture. The first question in every prize case is—was the vessel "captured" by the captors who demand its condemnation as prize? Similarly, in a claim for "prize salvage" it is normally essential to prove that the rescued ship had been "captured" by the enemy. (*The Progress* [1]; *The Edward and Mary.*[2])

This view of the matter, which is fundamental to the first and main issue in the case, is supported by the early history of prize jurisdiction. In Roscoe's History of the English Prize Court, the author points out how captures of ships when an English king was carrying on a naval war were likely to lead to complaints by neutrals or allies that their ships had been seized, and how the Lord High Admiral was authorized in early days by the Crown to investigate such complaints "with a delegated authority in the "nature of prize jurisdiction" (op. cit., p. 4). In course of time, a personage called the Admiral's deputy came into existence, who exercised a prize jurisdiction (Select Pleas of the Crown in the Court of Admiralty, Vol. I, p. xlii), and by the sixteenth century a rudimentary Prize Court undoubtedly existed (Roscoe, p. 11). The jurisdiction was to decide about "prizes," i.e., capture of ships. At the time of the Armada, for example, Dr. Julius Caesar, "doctor of laws, the duly appointed Judge-"Lieutenant of the High Court of Admiralty in England" was in 1589 pronouncing sentence of condemnation of a Spanish ship as lawful prize (Law and Custom of the Sea (Navy Records Society), Vol. I, p. 254).

Their Lordships therefore reach the conclusion that the physical capture of a ship is the same thing as taking her in prize, and that a Prize Court has jurisdiction to decide "according to "the course of admiralty and the law of nations" the fate of every vessel so captured. The fact that captors wished or intended to make the vessel a prize at a later date is irrelevant: she became a prize subject to the jurisdiction of the Prize Court from the moment of capture. It is the intention to seize, not the intention to seize in prize, that gives jurisdiction.

The view of their Lordships that the physical capture of a ship is the same thing as taking her in prize, and that the jurisdiction of the Prize Court arises from the mere fact of seizure, is supported by the language of the Naval Prize Act and by the Prize Rules made thereunder. The rules define "captor" as meaning "any person taking or seizing, or having taken or seized, "any ship, aircraft or goods as prize." It is true that section 16 of the Act requires, as a matter of procedure, that every ship taken as prize, and brought into port within the jurisdiction of a Prize Court shall be delivered up to the custody of the marshal, or failing him to the principal officer of customs of the port, and section 17 requires the captors "with all practicable speed" after this to bring the ship's papers into the registry of the court. If the captor seizes a ship and does not promptly act in accordance with these sections, this does not oust the jurisdiction of the Prize Court (see *The Zamora*,[3] *per* Lord Parker), but complaint can be made to it that this has not been done, and the Prize Court will permit those interested in the captured ship to institute proceedings before it and, in an appropriate case, to claim damages from the captor (see *The Remonstrant*[4] and Colombos on the Law of Prize, 3rd ed., p. 310). Similarly, once a ship is captured, the Prize Court has jurisdiction to control its requisition, and to make orders to preserve the res.

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[1] (1810) 1 Edw. 210.

[2] (1801) 3 C.Rob. 305.

When, then, did the capture of these objects take place? Allied forces, with which the British navy co-operated, captured Lübeck on May 2 or 3, and naval forces occupied Flensburg on May 10, 1945. Naval officers were appointed "to control the "ports and the shipping in them" (Admiral Baillie-Grohman's affidavit, para. 5). As a result "nothing could be done by the "Germans with their ships whether they were completed ships "or uncompleted ships building in shipyards" (same affidavit, para. 6). "Capture," said Lord Sumner in *The Pellworm*,[5] "consists in compelling the vessel captured to conform to the "captor's will. When that is done, deditio is complete." Admiral Baillie-Grohman hoisted his flag at Travemunde, at the mouth of the river on which Lübeck lies, and the entrances there and to Kiel harbour were controlled (paras. 3 and 8). The port of Emden, in which the *Hermes* was lying, was similarly captured and held with the co-operation of the British navy.

The inevitable conclusion from these facts is that the ships and other objects in the ports were "captured" at the same time as the ports themselves, just as, in *The Bellaman*,[6] ships aground in Tripoli harbour were regarded as seized when the port of Tripoli was taken. They became, in Lord Parker's phrase in *The Roumanian*,[7] "enemy goods seized on enemy territory by the "naval forces of the Crown." This is in accordance with Sir W. Scott's view in *The Progress*,[8] where he observed, in reference to the allegation that the French had captured shipping in the port of Oporto, "it is not necessary to shew that they had taken "formal possession of each individual ship, because they had "possession of the port itself; and the taking of that which "contained the vessels is in effect the same as taking bodily "possession of the ships themselves."

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[3] [1916] 2 A.C. 77, 104; 32 T.L.R. 436.

[4] (1917) 87 L.J.P.C. 26; 3 B. & C.P.C. 14.

[5] [1922] 1 A.C. 292, 302; 38 T.L.R. 338; 3 B. & C.P.C. 1053, 1059.

It may be objected that, if the seizure of a port in such circumstances involves the seizure of enemy ships within it, a ship which is in the port but which belongs to a neutral owner or is otherwise not liable to seizure is none the less seized and made prize. The answer is that this is indeed so, but the captor can put himself right by promptly releasing any vessel against which no claim of condemnation can be validly made (see para. 433 of Oppenheim, Vol. II, 7th. ed., p. 868). If there is unreasonable delay in releasing such a vessel, the parties interested have the right to compensation which is awarded by the Prize Court (see article 64 of the Declaration of London, which, though it was not ratified, embodies this rule).

To sum up, the fact which gives jurisdiction to the Prize Court is the fact that the ship was physically captured and taken out of the possession of her former owners. It is this fact which constitutes her a prize, and the intention of captors to postpone the date when the Prize Court has jurisdiction is irrelevant.

(b) The next question is whether the Lübeck and Flensburg structures were, at the time of their capture in May, 1945, capable in their then condition and position of being regarded as a res which was subject to capture as prize. As international law has developed, efforts have been made to set limits to the right of belligerents in war to capture property belonging to the enemy or to the enemy's subjects. Originally, no doubt, it was the practice of an army in invasion to seize such property on land and appropriate it and equally for a belligerent navy to capture enemy ships and the like and their cargoes. But the rule soon developed (even though it was not always observed) that it was not legitimate to seize enemy private property on land (unless it was ammunition or arms which could be used against the enemy in fighting) while it remained the law of nations that captures at sea by naval forces were authorized. By 1781 a distinction between land-warfare and maritime-warfare in this respect was recognized (see Lord Mansfield's judgment in *Lindo* v. *Rodney*, in a note to *Le Caux* v. *Eden* [9]).

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[6] [1948] 2 All E.R. 679.

[7] [1916] 1 A.C. 124, 138; 32 T.L.R. 98.

[8] 1 Edw. 210.

The explanation of this difference may well be found in the fact that merchant-shipping is used in war for purposes of transport; so long as it belongs to the subjects of the enemy, it adds to his strength, while the capture of merchant shipping at once reduces the enemy's power and adds to the power of the belligerent and hence becomes a legitimate operation of war. Moreover, merchant-shipping, unlike property on land, is usually found on the high seas, which belong to no particular nation. Cargoes belonging to, or destined for, the enemy (unless protected by the Declaration of Paris) are subject to capture by a belligerent for the same reason. The rule prohibiting the seizure by a belligerent of enemy property on land is now formulated in Hague Convention No. IV, dealing with the Laws and Customs of War on Land, drawn up in 1899 and revised in 1907, article 46 of which provides that "private property cannot be confiscated." This must be understood to refer to private property which does not consist of war material or means of transport serviceable for military operations (Oppenheim, Vol. II, 7th ed., para. 143); to capture and confiscate other private property in the course of land warfare would be pillage, and this is formally prohibited by article 47. Articles 52 and 53 deal with requisitions, and the latter article, as revised in 1907, contains the paragraph: "All "appliances, whether on land, at sea, or in the air, adapted for ". . . the transport of persons or goods apart from cases governed "by maritime law, depôts of arms, and, generally, all kinds of "war material may be seized, even though belonging to private "persons, but they must be restored and indemnities for them "regulated at the peace."

The phrase "apart from cases governed by maritime law" marks the divergence between the rules of war on land, which prohibit capture of private enemy property, and the rules governing sea warfare which permit prize-capture. On which side of the dividing line do the Flensburg and Lübeck structures fall? There is no authority or decided case exactly in point, and their Lordships agree with the President that the question whether the capture of any particular property is a justifiable means of coercion must be tested as a matter of principle. To use Lord Mansfield's phrase, it is necessary to consider "the "reason of the thing." Dana's note to Wheaton, 8th ed., p. 451, under the heading of "Distinction between Enemy's "Property at Sea and on Land" contains the following passage: "Where private property is taken, it is because it is of such a "character or so situated as to make its capture a justifiable "means of coercing the power with which we are at war. If the "hostile power has an interest in the property which is available "to him for the purposes of war, that fact makes it prima facie a "subject of capture. The enemy has such an interest in all "convertible and mercantile property within his control, or "belonging to persons who are living under his control, whether "it be on land or at sea. . . . The humanity and policy of "modern times have abstained from the taking of private "property, not liable to direct use in war, when on land."

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[9] (1781) 2 Doug. 594, 613.

Applying this test, it would seem to follow that an unfinished ship in course of construction can be a proper subject of prize, at any rate when captured by or with the assistance of naval forces, for its completion makes it available for wartime use. Their Lordships agree with the President that these structures, though not capable of floating at the time they were captured, are none the less to be regarded as "maritime property in a "maritime town" and are rightly to be regarded as maritime prize.

(c) The third and last question in the appeal affects only Hull 507 and Hull 508, which were under construction in the port of Flensburg when it was occupied by a detachment of the British army and by British naval forces on May 10, 1945. The appellants submitted that the seizure of these vessels was invalid because seizure in prize is an act of hostility, and because all hostilities were brought to an end on May 8, 1945, by the Act of Military Surrender signed at Berlin on that date on behalf of the German High Command in the presence of officers representing the Supreme Commander of the Allied Expeditionary Force and the Supreme High Command of the Russian Army. The Crown's submission is that the right to seize in prize persisted till June 5, 1945, when the Governments of the United Kingdom, the United States of America and the Union of Soviet Socialist Republics, and the Provisional Government of the French Republic by a declaration signed at Berlin by their representatives declared that they assumed supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command and any state, municipal and local government. That declaration admittedly brought to an end all hostilities between the allied powers and the German State, and it terminated the right of seizure, because thenceforward all German ships and maritime property were at the disposal of the allied powers as the supreme governing and legislative authority of the Reich. The decision of the President was that, though the victors might expressly and impliedly abrogate any rights that they may have jure belli, including rights of prize, he saw no reason for holding that the Crown had lost those rights because of anything which occurred before the declaration of June 5, 1945.

The Act of Military Surrender of May 8, 1945, by which the High Command surrendered unconditionally all forces on land, at sea and in the air which were at this date under German control is unprecedented and there is no legal decision of the courts of the United Kingdom, nor indeed of any foreign court, which defines the consequences in relation to the victor's right of prize. The appellants therefore, in default of more direct authority, sought to base an argument on precedents which define the effects of a general armistice. The argument was summarized by the President as follows: "It is at the very "least doubtful whether the exercise of belligerent rights in prize "is permitted during an armistice, unless they are expressly "reserved; and, seeing that an armistice is a mere suspension "of hostilities, so much the less can the exercise of these rights "be permissible after a total surrender, which involves an "absolute cessation of hostilities." This was in substance the argument presented to their Lordships.

The argument is beset by the weakness which attends all arguments from analogy. A general armistice is the result of a negotiation in which detailed consideration is normally given to the conduct during the armistice of the armed forces of both parties, and it frequently includes as one of its terms a provision dealing with the right of seizure in prize. When that is done the agreed term regulates the right. But when there is no term in the armistice dealing with the right, then it is a question whether a provision should be implied that the right of prize is suspended, and that question will depend on the special circumstances of each case. When there are no special circumstances, the practice, or it may be better to say the tendency, of the courts varies in different countries. In France, for example, the tendency is to hold that the right of prize is suspended (see *The Santa Flavia* [10]). The German and Italian courts in obedience to their own municipal legislation have taken a contrary view. There is, however, no doubt that during a general armistice the right of visit and search and the right to seize contraband and neutral vessels attempting to run a blockade are not suspended. Their Lordships are of opinion that if these rights can be exercised against neutrals, a fortiori the British courts would recognize the right of seizure of enemy ships. All these rights find their justification in the prevention during the armistice of the enemy's replenishment of his resources and of the increase of his warlike potentiality. If that be the sound view, the supposed analogy between a general armistice and an unconditional surrender turns against the appellants.

But the absolute surrender of all existing military forces is not truly analogous to a general armistice, and provisions regulating the conduct of the victor's forces find no place in it and are, indeed, incompatible with it. It may not be correct to describe such a surrender as a unilateral act of the vanquished enemy, for, to take the present instance, the surrender was received by the victor as an acceptance of terms which he might impose. Article 4 of the Act of Surrender of May 8, 1945, expressly provided that it should be " without prejudice to, and " will be superseded by any general instrument of surrender " imposed by, or on behalf of the United Nations "; and the Berlin Declaration of June 5, 1945, was in fact the general instrument of surrender contemplated by that article. In the interval between May 8 and June 5 it would of course have been contrary to international law and the dictates of humanity to attack submissive and unresisting officers and men of the German forces, and it would not be incorrect to say that abstention by the victor from acts of that kind was an inherent condition of the surrender. But there is no necessity to imply a condition that all rights jure belli were to be forgone by the victor. The Allies were, for example, fully entitled to order their forces to advance further into German territory, and their Lordships have no doubt that they remained entitled to seize German vessels on the high seas in prize.

There are two specialities of the situation as it stood on May 8, 1945, which provide additional and independent grounds for this conclusion. The first is that there was on May 8 no surrender of the German government or of the Reich itself. The appellant's case is that the victor's rights as a belligerent were immediately replaced by rights of subjugation. Such an instantaneous transition is scarcely practicable even when it is the enemy government that surrenders. But there was a German government still in existence on May 8, and it was entitled to raise new forces, to dismiss the existing High Command, to appoint new military leaders with instructions to continue the struggle. A prolonged resistance after the defeat of the German armies had often been threatened by German leaders, and on May 8 it could not have been said that the resistance of the Reich was finally at an end. It is significant that the Berlin Declaration of June 5, 1945, instead of proceeding merely on the narrative that the German armed forces had surrendered, narrates also that Germany was no longer capable of resisting the will of the victorious Powers, and that the unconditional surrender of Germany had thereby been effected. By June 5 the chief members of the German government had been arrested, and the passive submission of Germany to the will of the victors had become an accomplished fact. It was therefore the Declaration of Berlin that terminated all hostilities and ended the right of seizure.

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[10] Prises Maritimes, Jurisprudence Française de la Guerre 1939–45, p. 421.

The other matter is that Germany had been waging war in alliance with the Japanese Empire, and that the war with Japan continued after the surrender of the German armed forces. Their Lordships agree with the Crown's submission that when war is carried on by partners as allies the unconditional surrender of one cannot protect it against the right of seizure so long as active hostilities are continued by a partner, unless the victor consents to abrogate his right.

Their Lordships do not find it necessary to consider the opinions of writers on the effect of the unconditional surrender of Germany's armed forces on the right to seize in prize. No author was cited who had had before his mind the precise state of affairs between the surrender on May 8, 1945, and the Berlin Declaration of June 5, 1945, or the distinction between a surrender by the High Command and the surrender of the Reich, or the effect of the continuance of the war by Germany's ally, Japan.

Their Lordships find themselves in agreement with the opinion of the President that the victor may abrogate his rights jure belli, including rights of prize, not only by an express

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renunciation, but also impliedly by his conduct, and they would add that there may be circumstances in which unreasonable delay after an unconditional surrender in regulating the situation by a new declaration or arrangement may have a prejudicial effect on the victor's retention of his rights.

Their Lordships, therefore, hold that the condemnation as good and lawful prize pronounced by the Prize Court was correct and will humbly advise Her Majesty that this appeal should be dismissed. The conclusion at which their Lordships have arrived renders it unnecessary to decide the fourth question formulated by Lord Merriman.

Inasmuch as the ultimate case for the Crown varied so widely from that first presented, there will be no costs of the appeal.

Solicitors: *Freshfields; Treasury Solicitor.*

[HOUSE OF LORDS.]

COUTTS & CO. . . . . APPELLANTS;

AND

INLAND REVENUE COMMISSIONERS . RESPONDENTS.

H. L. (E.)*

1952
May 19, 20, 21.
1953
Feb. 5.

Revenue—Estate duty—Property deemed to pass—Settlement—Policies on settlor's life purchased by settlement trustees—Payment of premiums out of trust income—Death of settlor—Cesser of interest —Accrual of benefits to tenant for life and remainderman—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 2 (1) (*b*); *s.* 7 (7).

By a disentailing deed made between a father, his son and certain trustees, the son's entailed interest in certain settled funds was barred and the funds were limited upon such trusts as the father and son should jointly appoint, with a limitation over in default of appointment. The father and son in exercise of their joint power executed a deed of appointment and resettlement of the funds, whereby the father was excluded from all further interest in the settled funds. The deed of appointment provided that the trustees should purchase from the father certain policies on his life and should, out of the trust income, pay the premiums necessary for keeping them on foot. Subject to this and other outgoings, the trustees were to hold the balance of the income upon protective trusts for the benefit of the son for life. The deed contained a number of further provisions under which the son was given powers of appointment in favour of his children, remoter issue and any wife who might survive him, with ultimate trusts in favour of the father's three daughters. The father died in 1946 and his life policies then fell in. The son had had no children and had not exercised any of the powers of appointment given to him so as to affect the interest in remainder in the settled funds vested in the three daughters of the father. Under the trusts the father had a general power of appointment which he exercised by the residuary gift contained in his will, substituting a testamentary interest in his daughters for their previous interest, but it was common ground that this did not affect the question to be determined. On the death of the father estate duty was claimed in respect of the slice of the trust funds of which the income was required to pay the premiums on the father's life policies, the Crown contending that it constituted property in which persons had an " interest ceasing on the death of the deceased " and that benefits accrued " by the cesser of such interest," within the meaning of section 2 (1) (*b*) of the Finance Act, 1894:—

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* *Present*: VISCOUNT JOWITT, LORD PORTER, LORD REID and LORD ASQUITH OF BISHOPSTONE.

Held, that the estate duty claimed was not payable. The interest of the daughters in the property was the right to receive the sum due under the policies and the payment of the premiums was merely incidental to that interest. On the death the destination of the property was not altered nor was its character changed, and the right to receive it did not cease, so that there was no " cesser " of such interest " within section 2 (1) (*b*) of the Act.

In re Hodson's Settlement [1939] Ch. 343; 55 T.L.R. 357; [1939] 1 All E.R. 196 and *Westminster Bank Ld.* v. *Attorney-General* [1939] Ch. 610; [1939] 2 All E.R. 72 distinguished.

Decision of the Court of Appeal (sub nom. *In re Brassey's Deed of Appointment; Coutts & Co.* v. *Inland Revenue Commissioners*) [1951] Ch. 979 reversed.

APPEAL from the Court of Appeal (Evershed M.R., Jenkins and Birkett L.JJ.).

This was an appeal from an order of the Court of Appeal made on June 20, 1951, affirming an order of Romer J. made on December 13, 1950, in an action instituted under the Administration of Justice (Miscellaneous Provisions) Act, 1933, by originating summons in which the appellants, Coutts & Co., were plaintiffs, and the respondents, the Commissioners of Inland Revenue, were defendants. The question raised was as to the liability for estate duty on the death of Captain Robert Bingham Brassey, the deceased. The appellants, who were trustees of a deed of appointment and resettlement dated August 8, 1935, held certain policies on his life. He died on November 14, 1946. A son, Hugo, and three daughters survived him.

By a disentailing deed dated August 6, 1935, Hugo's entailed interest in certain property settled on June 3, 1897, was barred and the property was made subject to a general power of appointment vested in the deceased and Hugo jointly, and, subject thereto, was limited "upon the trusts and subject to the powers "and provisions which under or by virtue of the [settlement of "1897] were subsisting or capable of taking effect in or over "the same premises immediately before the execution of these "presents."

The joint power was exercised by the deed of appointment and resettlement dated August 8, 1935, whereby the deceased and Hugo resettled (inter alia) £196,696 2s. 5d. on such trusts and, subject to such powers and provisions as they should jointly appoint and in default of and subject to any such appointment, on trusts and subject to powers and provisions which (so far as material) were as follows: The trustees were directed to purchase thereout from the deceased for £11,000, or such larger sum as should represent the surrender value at the date of purchase certain policies on the deceased's life for assuring an aggregate sum of £40,000 on his death at an aggregate annual premium of £1,976 13s. 4d. The trustees were to hold any balance of the sum of £196,696 2s. 5d. as capital moneys under the resettlement. The trustees were directed out of the income of the trust fund to pay the premiums necessary for keeping on foot the policies and to hold the balance of the income on protective trusts for the benefit of Hugo during his life. After the death of Hugo the trustees were directed to stand possessed of the capital and income of the trust fund on trusts in favour of the children or remoter issue of Hugo or of any wife who might survive him as he might appoint. It was provided that the trustees should not be chargeable or responsible for any omission or neglect to keep up or restore the policies.

In accordance with the provisions of the resettlement the policies were purchased by the trustees of the resettlement from the deceased, who was at no time thereafter interested in the policies or the moneys thereby assured, nor had he any interest under the resettlement. From the date of the resettlement until his death the premiums were paid by the trustees out of the income of the trust fund, and on his death the policies matured and the sum of £40,000 was subsequently paid to the trustees. From the date of the resettlement the income, after payment of the premiums, had been paid by the trustees to Hugo. At the death of the deceased Hugo was not married and had no issue.

He had not then exercised his power of appointment in favour of a surviving wife and he was the only ascertained person interested under the trusts.

In the event of failure or determination of the trusts declared by the resettlement the property comprised therein would (in default of any further exercise by the deceased and Hugo of their joint power of disposition reserved in the disentailing deed or the resettlement) on the death of Hugo have devolved as follows by virtue of the disentailing deed: "upon such of the trusts and "subject to the powers and provisions which under or by virtue "of the [settlement of 1897] were subsisting or capable of taking "effect immediately before the execution of" the disentailing deed. These limitations were (inter alia) to such uses, for such estates and in such manner as the deceased should by deed or will appoint, and in default of appointment to his daughters. The deceased did not exercise by deed his general power of appointment, but it was exercised by the residuary gift contained in his will whereby his residuary estate was directed to be held in trust for his daughters.

The position as to income and capital immediately before and after the death of the deceased was as follows: Income: Immediately before the death Hugo was entitled to the whole income of the settled funds after payment of the policy premiums; immediately after the death he was entitled to the whole of the income of the settled funds, including the policy moneys when invested. Capital: Immediately before the death he was able to deal with the whole capital of the settled funds, including the policies, either by exercise of his general power of appointment or by virtue of his tenancy in tail restored and confirmed by the disentailing deed; immediately after the death he was similarly able to deal with the capital.

Following the death of the deceased, the estate duty office claimed estate duty under section 2 (1) (*b*) of the Finance Act, 1894, in respect of the "slice" of the trust fund required by the income thereof to pay the premiums on the policies. The "slice" had been calculated to be £104,951 and it was probable that the rate of duty applicable (if the claim were substantiated) would be 65 per cent. The claim for duty in respect of the "slice" would thus probably amount to over £68,000, although the total sum assured by the policies was only £40,000.

Russell Q.C. and *R. Cozens-Hardy Horne* for the appellants. It has been held in the court below that to the extent of the annual sums required for keeping up the policies the sisters had an interest in the settled funds which ceased on the death of the deceased within the meaning of section 2 (1) (*b*) of the Finance Act, 1894. This is ill-founded.

(1) On their first submission the appellants assume (i) that the accumulation cases, *In re Hodson's Settlement*[1] and *Westminster Bank Ld.* v. *Attorney-General*[2] are rightly decided; (ii) that, though decided under section 1, they are applicable to section 2 cases so far as accumulations are concerned; (iii) that the principle of the accumulation cases is applicable to this kind of disposition of life assurance policies. Nevertheless, in this case the alleged interest of the sisters relied on by the Crown is so remote as to be utterly unworthy of consideration and wholly illusory. It is impossible fairly to describe as a beneficial proprietary interest the right of the sisters to have gone to the court to demand payment of the premiums. One cannot treat such a right as ancillary to a proprietary interest and therefore describe it as an interest in property, for it was only a right to go to the court to ask its help in protecting their proprietary interest. It cannot be said that any benefit accrued by the cesser of the right to take steps to enforce their rights in relation to the premiums. Even if prima facie the interest could include a mere ancillary right to go to the court, this case lies outside that possibility. Here the right is wholly illusory and could not have been enforced. So far as the right to require £1,976 13s. 4d. a year to be taken from Hugo is concerned, he could by a stroke of the pen have deprived his three sisters of all standing to make the application, and accordingly they would not have done so. The court would not have enforced payment of the premiums when this could do nothing but harm to those interested in the estate. The sisters' interest in the capital was so remote as to be negligible: see *Burrell* v. *Attorney-General.*[3]

(2) Alternatively, the appellants confine themselves to assumptions (i) and (ii) already stated, and it is submitted that the accumulation authorities do not apply to this case, which is of a wholly different character, and in which it cannot be said that an equitable property in the income arises as soon as it is received by the trustees. In the accumulation cases nothing has to be done by the court to turn each piece of income as it reaches the trustees into something in which the remainderman has an interest; it becomes automatically capital. This is not a case of

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[1] [1939] Ch. 343.

[2] [1939] Ch. 610.

[3] [1937] A.C. 286, 295, 299.

accumulation: see *Bassil* v. *Lister*.[4] It is important to consider the differences between the accumulation cases and such a case as this. The question under section 2 (1) (*b*) of the Act of 1894 is whether some person had a proprietary interest in property. The sisters' right to go to the court, already referred to, is not an interest in property. There is a difference between the proprietary interest of a remainderman and a right to ask the court to enforce a particular trust which may have a beneficial result for an individual: see *Archer-Shee* v. *Garland*.[5] Under section 2 (1) (*b*) taxation is only imposed to the extent that a benefit accrues or arises by the cesser of an interest. The benefit arising must be consequent on the cesser and does not mean " simultaneously " with the cesser." Hugo got an extra £1,976 13s. 4d. a year, but this was not due to the cesser of his sisters' interest. What affected the matter was the existence of the policy and the trust. This money did not come by reason of the ending of his sisters' right to apply to the court, but by reason of the falling in of the policies. The benefit arose at the same moment of time as the cesser of that interest (if it was an interest) but did not arise from the cesser. In applying section 2 (1) (*b*) in the present case the " property " is the whole property included in the trust but the interest is the right to receive the sums payable under the policies, and to that the payment of the premiums is merely incidental. The right to receive this sum in certain events is the interest of the sisters, an interest which always subsisted and which has not changed, by reason of the death of the deceased, either in its nature or in the capacity in which it is held. No change resulted from the death save that the policy moneys which had not been immediately payable became an accrued debt. Had there been no assurance premiums, but simply a debt debitum in praesenti though not solvendum until the death of a certain person, there could have been no question of the cesser of an interest, since throughout the money would have been receivable on the death and when it became immediately payable the character of the interest would not have been altered. For an interest to come within section 2 (1) (*b*) the person who had it before the death must have been in the actual enjoyment of something which on the death ceased to be payable to him and thereafter went to benefit someone else.

(3) Alternatively, the appellants confine themselves to assumption (i), submitting that the accumulation cases are

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[4] (1851) 9 Hare 177.

[5] [1931] A.C. 217.

restricted to section 1. The words of section 2 are different. See also *Attorney-General* v. *Barclays Bank Ld.*[6]; *Attorney-General* v. *Lloyds Bank Ld.*,[7] *and Scott* v. *Inland Revenue Commissioners.*[8]

(4) Alternatively, even under section 1 the accumulation cases were wrongly decided.

Pennycuick Q.C. and *J. H. Stamp* for the Crown. The property in question is the whole property included in the trust and the interest of the sisters in it is the right to have the premiums paid out of it. Because unless the premiums were paid the policies would have lapsed, the sisters had a beneficial interest in possession in the sums paid as premiums. On the death of the assured the sisters' interest ceased because the payment of the premiums ceased. As a result of the cesser of that interest a benefit accrued to Hugo. If there had not been someone alive at the death of the deceased who had a more remote interest under the settlement than Hugo, the Crown would have had no claim to estate duty. That claim depends on the sisters' interest. Their right ultimately to come into enjoyment of something under the settlement is immaterial and the court is only concerned with their separate and independent right during the life of the deceased in relation to the money paid as premiums. That is an "interest" within section 2 (1) (*b*) of the Act, and the case would not have been different if the deceased had not exercised his testamentary power of appointment and the sisters had retained their rights in remainder under the settlement after his death.

As to the accumulation cases, the members of a class for whose collective benefit income is being accumulated have collectively an equitable interest in possession in the income under accumulation. That goes to the root of the present case. The interest is an equitable interest and not a mere right of enforcement.

Section 1 of the Act deals with cases where property changes hands as a whole on the death, and section 2 deals with cases where property does not change hands but is deemed to pass. Section 7 (7) of the Act indicates the "slice" principle on which the Crown's claim is based. The principle of section 1 has been applied to discretionary trusts: see *Scott* v. *Inland Revenue Commissioners*[9] and *Burrell* v. *Attorney-General.*[10] One must look at the interest in possession immediately before and immediately after the death and see whether before the death the property belonged to one class and after the death belonged to another. There is no decided case relating to a discretionary trust of an annuity which ceased on the death so that income formerly disposed of for the benefit of the discretionary class joined the main stream of income payable to an individual.

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[6] (1942) 59 T.L.R. 52; (C.A.) [1943] K.B. 721.

[7] [1935] A.C. 382.

[8] [1937] A.C. 174.

[9] [1937] A.C. 174.

[10] [1937] A.C. 286.

It is well established that an annuity payable out of the income of a trust fund constitutes an interest in rem extending to the whole income, though limited to the amount of the annuity. The whole income is liable as a "fall back" and the annuitant has an equitable interest in the trust fund and not merely a right in personam against the trustees for the amount of the annuity: see *In re White*[11]; *Skinner* v. *Attorney-General*[12]; *Attorney-General* v. *Farrell*[13]; *Attorney-General* v. *Heywood.*[14]

As to the accumulation cases of *In re Hodson's Settlement*[15] and *Westminster Bank Ld.* v. *Attorney-General,*[16] it was expressly held that the collective class had an interest in possession in the income of the funds; that is the ratio decidendi. Those cases were correctly decided.

The property here involved is the trust fund as a whole. The persons with an interest in it were the collective class consisting of Hugo and his sisters. Their right was to have an annual sum applied in obtaining for them a capital asset through the payment of the premiums. The benefit arises to Hugo by the cesser of that interest in the respect that the income which up to the death was applicable for the benefit of the collective class in payment of the premiums then became payable to him; that was how the benefit accrued or arose. The determination of the annuity set that income free for the benefit of the persons thereafter entitled.

The common case is that during the life of A an annuity is payable to B, some person other than C, the tenant for life, and, subject to the annuity, the whole income is payable to the tenant for life, and that on the death of A the annuity ceases, so that, in consequence of the annuity ceasing, C, the tenant for life, gets a benefit because the amount previously payable to the annuitant becomes payable to him. So here too a benefit accrued to Hugo by the cesser of the previous interest.

The vital consideration is that there was a class which had this particular interest during the life of the deceased and that on his death that interest ceased and Hugo was thereby better off by £1,976 13s. 4d. a year. In section 2 (1) (*b*) "by" means "in consequence of" and not "coincidentally with."

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[11] [1939] Ch. 131.

[12] [1940] A.C. 350, 358.

[13] [1931] 1 K.B. 81.

[14] (1887) 19 Q.B.D. 326.

[15] [1939] Ch. 343.

[16] [1939] Ch. 610, 616.

A reversioner has a right to go to the court to prevent the corpus of the property being wasted. In a case of accumulation the reversioner has a substantial interest in possession in the income of the property—an equitable interest in possession. Where you have an annual sum which, under the trusts of a disposition, is to be accumulated during the life of the settlor and, subject thereto, the whole income belongs to a son of the settlor with remainders over to his issue and gifts over in default, all the beneficiaries who together are entitled to the corpus have a beneficial interest in possession in the annual sum for the purposes of section 2 (1) (*b*). Similarly here the collective class is interested in the amount of the income required for the premiums. No line is to be drawn between interests which are and interests which are not too small to be taken into account, but in any event the interest of the sisters in the present case was by no means microscopic or illusory. It was a vested interest in the whole property and there is no logical ground on which it could be disregarded. They had the whole beneficial interest in possession subject to defeasance, and the court would protect it. See also Finance Act, 1940, s. 43.

A trust for payment of premiums is not necessarily in every case the same as a trust for accumulations, but here there is a trust for the application of income in a particular manner. For that purpose there is no difference between the interest of a collective class entitled to the corpus in an accumulation case and such a case as the present. Taking the word "interest" in the ordinary sense of the English language, a person has an interest in property if he has a right to require all or any part of its income to be applied for his benefit, whether immediate or future, certain or contingent, and there is no context in the Act of 1894 requiring the word in section 2 (1) (*b*) to be given a restricted meaning. The Act contains no means of defining it as used in the subsection unless it has there its usual scope. There is no reason for seeking to cut down the scope of the word having regard to the general scope of the Act. To construe it in its full sense does not involve any departure from the general principle of taxing changes in the enjoyment of property taking place on death. Accordingly, there was here an "interest" which came to an end on death, in that the persons contingently entitled in reversion to the corpus of the funds during the life of the deceased had an interest so understood.

In summary: (i) the accumulation cases were rightly decided; (ii) the principle underlying them is equally applicable to sections 1 and 2 (1) (*b*); (iii) for this purpose there is no relevant distinction between a trust for accumulation and a trust for the payment of premiums on life policies; (iv) there is nothing in the particular circumstances of this case which excludes the application of the principle.

J. H. Stamp following. The value of the interest taxed under this section never bears any real relation to the value of the property passing; it is always less than the value of the interest which has come to an end. What is taxed is the proportion of the settled fund which has produced this annual income. The general principle of the Act is that when the interest passes the corpus is taxed, and it thus inevitably happens that the tax payable is greater than the interest. There is nothing startling in that.

Russell Q.C. in reply. However much one talks of equitable interests in possession one cannot say that a benefit to Hugo arose or accrued by reason of the cesser of the interest of his sisters. If they had died before the deceased their interest would not have existed at his death and Hugo would have got the interest he did without the cesser of their interest. The cesser of an interest cannot be the cause of a benefit to him, because the benefit would have happened whether or not those alleged interests had existed. His right arose because the policy was dead and the premiums no longer had anything to operate on.

The sisters had not got an interest in possession or a proprietary interest. Their right to have the premiums paid was not such an interest as is referred to in section 2 (1) (*b*). That subsection only relates to cases where income is paid to the person having the interest; it does not cover "salting it away."

This is not like a case of accumulation. In the case of an accumulation provision the sooner the death occurs the smaller is the accumulation, and therefore by reason of the death the remainderman has lost something. But in the case of a life policy the remainderman loses nothing by reason of an early death for, whenever the death occurs, the amount payable is the same.

For an interest to cease there must be the cutting short of a beneficial right. No beneficial right of the sisters was cut short, though it would have been otherwise in the case of an accumulation clause.

The supposed right of the sisters to go to the court was wholly illusory. Their rights were not enforceable, for if they had sought to apply to the court Hugo would have deprived them of all standing by disentailing. This case is nowhere near section 43 of the Act of 1940.

Their Lordships took time for consideration.

February 5, 1953. EARL JOWITT. My Lords, I have had the advantage of reading the opinions about to be delivered by my noble and learned friends, Lord Porter and Lord Reid. I agree with them and have nothing to add. I beg to move that the appeal be allowed.

LORD PORTER. My Lords, the circumstances of this case are stated in the opinion about to be delivered by my noble friend, Lord Reid, and need not be repeated, but for clarity's sake it is desirable to set out one or two salient facts. The dispute concerns the right of the Crown to estate duty on the death of Captain Brassey. On his death the person entitled to his estate, so far as concerns the claim in this case, was one Hugo Brassey, who was immediately interested. In certain events, however, the estate would pass to his three sisters, daughters of Captain Brassey. It is admitted that at the death these ladies had a vested right in the property. Part of that property consisted of four policies, for £40,000 in all, upon the life of Captain Brassey, and all of it was the subject of a trust of which the appellants were trustees. By the terms of that trust they were directed to, and did in fact, purchase the policies for £11,000, as representing, or approximately representing, their surrender value at the date of purchase, and were also directed to pay, and did pay, the premiums necessary for keeping on foot the four policies, but were not to be responsible for any omissions or neglect to keep up or restore them.

Under the provisions of the trust both Captain Brassey and Hugo Brassey had certain powers of disposition which might have put an end to the ladies' interest. Hugo, however, never exercised his powers and though Captain Brassey did exercise his by will, thereby substituting a testamentary interest in the ladies in lieu of their previous interest, it may be stated with sufficient accuracy for the determination of the matter now in issue that Hugo Brassey was entitled to the present enjoyment of the income of the estate but, inter alia, subject to a liability to pay the premiums on the policies, amounting to £1,976 13s. 4d. a year. In these circumstances, no doubt, the ladies could have applied during Captain Brassey's life to the appropriate court to compel performance of the obligation to pay the premiums and to maintain the policies, an application to which, in a proper case, the court would no doubt have acceded, though whether they would have done so in the present case is a matter of controversy. I will, however, assume that it would have done so.

The position, therefore, before Captain Brassey's death was that Hugo Brassey was entitled to the whole of the income subject to certain obligations which are immaterial to the present case, but was under a liability to pay the yearly premiums in favour of the cestuis que trustent who, for this purpose, consisted of himself and the three ladies. After the death he was entitled to the whole income discharged from such a liability.

In these circumstances the Crown claims estate duty under the terms of section 2 (1) (*b*) of the Finance Act, 1894, calculated in accordance with the provisions of section 7 of that Act. If the Crown is right, admittedly the sum due must be ascertained in accordance with the provisions of section 7, and no more need be said about it except that the result would be that the maintenance of the policies would, in a monetary sense, result in an obligation to pay estate duty far in excess of the insurance money recoverable.

Whether the Crown's claim is or is not justified depends upon the correct construction of section 2 (1) (*b*) in the light of the facts of the case. That subsection reads as follows: "Property passing on the death of the deceased shall be deemed "to include the property following, that is to say:— . . . (*b*) "property in which the deceased or any other person had an "interest ceasing on the death of the deceased, to the extent "to which a benefit accrues or arises by the cesser of such "interest . . ."

If it is to succeed, the Crown must establish that there is property in which some person had an interest and that the interest ceased on the death of the deceased. In the present instance the other persons are the three ladies, and undoubtedly they had an interest in certain property, but what that interest was and whether it had ceased on Captain Brassey's death is a matter of dispute.

The Crown say that the property is the whole property included in the trust, and that the interest is the right to have the premiums paid thereout, that the ladies are interested in the payment because without it the policies would lapse, that that interest ceased on the death of the assured and, therefore, under the plain terms of the Act, the Crown is entitled to claim and receive estate duty.

The appellants, as I understand them, agree that the property is that whole property but contend that the interest is the right to receive the sum insured and that the payment of the premiums is merely incidental to that interest. What the sisters are interested in is, they maintain, the sum assured and nothing else; the right to receive that sum in certain events always subsisted in the ladies and their interest has not changed: they do not hold a different interest or hold it in a different capacity as a result of Captain Brassey's death: the only change effected thereby is that whereas before it the policy money was not immediately payable, afterwards it became an accrued debt. If, they say, there had been no question of insurance and premium, but merely a debt "debitum in praesenti" but not "solvendum" until the death of a particular person, there would be no cesser of interest—from first to last the interest would be the money receivable on the death and that interest would not have changed its character as a result of becoming immediately payable.

Does it, then, make a difference that it was necessary to pay the premiums in order to keep the property in being? The answer to this question appears to me to depend upon what is the interest which the other person possesses in the property. If it be the expectation of receiving the capital sum payable on the death, the destination of the property has not been altered nor has its character changed; the only effect of the death has been to make it presently payable. The right to receive it has not ceased. If, on the other hand, it be the right to have the premiums paid, then, of course, the ladies' interest in that right has ceased.

If property is to be deemed to pass, still there must be not only property and a person or persons interested but also a cessation of that interest. The first inquiry therefore is: In what does that interest consist? I cannot think that in any ordinary sense the interest is the right to have the premiums paid. What the ladies were interested in was the receipt of the policy money. The death did not affect that interest so as to make it cease, it removed a prerequisite to the insurance company's liability. It was merely an event upon which the insurance money became payable. The ladies' interest was unchanged. If the question were whether Hugo Brassey had obtained an advantage by reason of the death undoubtedly he did, but the benefit accruing or arising is but one element towards the establishment of the Crown's claim: an interest in property and a cesser of that interest are further requisites for the respondents' success.

The accumulation cases *In re Hodson's Settlement* [1] and *Westminster Bank Ld.* v. *Attorney-General* [2] are in a different category. In each case the decision was that the property was deemed to pass under section 1 of the Act and not under section 2 because the persons ultimately entitled ceased to enjoy the right to have a portion of the estate, which might ultimately pass to them, increased by an accumulation of the income and the person immediately entitled benefited by the receipt of income which he was no longer under an obligation to accumulate by way of addition to the capital of the fund. Such a decision has, in my view, no direct application to the facts of the present case. The ladies have not ceased to enjoy anything. On the contrary, the property in which they are interested has become more valuable.

Having regard to the opinion which I have expressed, I have not found it necessary to discuss the alleged remoteness of the ladies' interest or to consider the effect, if it has any, of the circumstance that Captain Brassey did, as he was entitled, appoint an ultimate interest to the ladies by his will in place of their interest under the settlement. Both circumstances are, I think, irrelevant to the question involved in this case. I would allow the appeal.

LORD REID. My Lords, the appellants, who are trustees under a deed of appointment and resettlement of 1935, held policies for £40,000 on the life of Captain Brassey. In accordance with directions in that deed they paid, out of the annual income of the trust, premiums on those policies amounting to £1,976 per annum. Captain Brassey died in 1946, and on his death, as no further premiums were payable, the income of the tenant for life, Hugo Brassey, was increased by the amount which had previously been required to pay the premiums. The Crown contends that, in consequence of that change, estate duty became payable on a sum of over £100,000 and the amount of duty claimed is over

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[1] [1939] Ch. 343.

[2] [1939] Ch. 610.

£60,000. In general, if it is alleged that a statutory provision brings about a result which is so startling, one looks for some other possible meaning of the statute which will avoid such a result, because there is some presumption that Parliament does not intend its legislation to produce highly inequitable results. But I do not think that that is the proper way to approach this case.

When estate duty was introduced by the Finance Act, 1894, the rates of duty were low. For an estate between £100,000 and £150,000 the rate of duty was 6 per cent. and even for the largest estates it was only 8 per cent. The Act provided a method of valuation of benefits accruing on the cesser of an interest which generally inflated the real value of such benefits and often resulted in the statutory valuation very greatly exceeding any possible real value. No doubt this was administratively a convenient course, and, as the rates of duty were such that the additional burden thrown on the taxpayer was in any case relatively small, it may have been thought that practical convenience outweighed any small injustice which might result. But, as the rates of duty were increased from time to time, the effect of the disparity became more serious. This was, of course, well known to those who advised Parliament in these matters, but nevertheless Parliament has not chosen to make any alteration. In my view, the glaring disparity which appears in the present case cannot properly be attributed to the Act of 1894: it must be attributed to the fact that Parliament has not chosen to make any change to meet vastly different circumstances and it is, therefore, not a matter which can properly be regarded as material in construing the Act of 1894. That Act is a taxing statute and must be construed as such, but it ought not to be more strictly construed because of the effect of subsequent enactments. "The expressions used must be given fair play" (*per* Lord Dunedin in *Attorney-General* v. *Milne* [3]) even if the result of combining them with later enactments is to produce claims such as that made by the Crown in this case.

The Crown's claim is based on section 2 (1) (*b*) of the Act of 1894 which is as follows: "Property passing on the death of the "deceased shall be deemed to include the property following, "that is to say: . . . (*b*) Property in which the deceased or "any other person had an interest ceasing on the death of the "deceased, to the extent to which a benefit accrues or arises by

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[3] [1914] A.C. 765, 778.

"the cesser of such interest; but exclusive of property the "interest in which of the deceased or other person was only an "interest as holder of an office, or recipient of the benefits of a "charity, or as a corporation sole."

The deceased, Captain Brassey, had no interest in the property but it is said that other persons had such an interest, that it ceased on his death and that by its cessation a benefit accrued to Hugo Brassey.

It was admitted for the Crown that, in order to bring the subsection into operation, there must have been some living person who had an interest which ceased on the death of the deceased. Those first entitled on the death of Hugo Brassey were his issue, but at the date of Captain Brassey's death he had no issue, and it is admitted that, unless there had happened to be someone alive at that date with a more remote interest under the settlement, the Crown would have had no claim. But it so happened that there were three daughters of Captain Brassey who would ultimately have become entitled under the settlement if nothing occurred to defeat their rights. Those rights could have been defeated in a number of ways; first, by the exercise by Captain Brassey and Hugo Brassey of an overriding power under the settlement; secondly, by Hugo Brassey barring the entail; thirdly, by Hugo Brassey exercising his general power of appointment in default of issue; and, lastly, by Captain Brassey exercising a power of appointment by will. It was argued for the appellants that this made the sisters' rights so remote that they ought to be disregarded, but I cannot accept that argument. It was conceded that they had a vested right and whether the defeasance of that right was more or less likely cannot, in my judgment, be material. So it was necessary to see what the interest of the three sisters was. No doubt they had an interest in the sense that, if nothing occurred to prevent them, they would in due course take beneficial rights under the settlement. It so happens that this interest did cease at the date of Captain Brassey's death, because he exercised his testamentary power of appointment. But the Crown's case is not based on that. Even if that were regarded as the cesser of an interest in the statutory sense, it would not bring the subsection into operation because it had nothing to do with the benefit which accrued to Hugo Brassey and it is that benefit which the Crown is seeking to tax. The benefit to Hugo Brassey was the increase of his income when he became entitled to the money which had previously been required to pay the premiums, and he would have got that benefit on Captain Brassey's death whether Captain Brassey died testate or intestate or whether he exercised his power of appointment or not. The Crown's case is based on the cesser of quite a different interest which the sisters are said to have had during Captain Brassey's life: they are said to have had a "beneficial interest in possession" in the sums paid as premiums. The argument, as I understand it, is that on Captain Brassey's death payment of premiums ceased, and therefore this interest ceased also: the benefit to Hugo Brassey arose because the premiums were no longer payable and therefore arose by the cesser of the sisters' interest in the premiums. Mr. Pennycuick in his lucid argument for the Crown made it clear that he was not concerned with the sisters' right ultimately to come into enjoyment of anything under the settlement. He was only concerned with their right during Captain Brassey's life in relation to the money for the premiums, and he argued that this was a separate and independent right and that his case would have been just the same if Captain Brassey had not exercised his testamentary power of appointment and the sisters had retained their rights in remainder under the settlement after Captain Brassey's death.

So the Crown's case depends on the rights of tenants in remainder with regard to money for premiums being a separate and independent "interest" within the meaning of section 2 (1) (*b*). The Act is an Act which applies to the United Kingdom, and the word "interest" is an ordinary word of the English language. So one ought not to give to the word a technical meaning peculiar to English or Scots law unless there is some indication that such a technical meaning is intended. I can find no such indication in this Act.

The Act gives some assistance in determining what is meant by an "interest." Section 2 comes into operation if the property does not "pass" under section 1. So an "interest" is some right with regard to the property, e.g., an annuity payable out of the income from it, which can cease without the property passing. Then a benefit to someone must accrue or arise by the cesser of the interest. That would be satisfied if, by reason of the cesser of the annuity, the person who previously got the income from the property less the amount necessary to pay the annuity now gets the whole income. It was argued for the appellants that there cannot be an interest within the meaning of the subsection unless the person who had the interest before the death was actually enjoying something which ceased to be payable to him on the death and thereafter went to benefit someone else. In the ordinary case that would be so, but I do not think that it is necessary in this case to decide whether that must be so in every case. One can imagine a case in which a sum out of the income from the property is being accumulated during the life of A so that the benefit of the accumulations will later go to X. It might not be difficult then to say that X had an interest ceasing on A's death in the sums which were being accumulated. X would get the benefit of them ultimately and the longer A lived the more he would get. If that be so, it might be that, even if there were only a chance of X ever taking any benefit, X could still be regarded as having an interest. But the facts of this case are to my mind essentially different.

In this case the real interest of the tenants in remainder was not in the premiums but in the sums assured. Payment of the premiums was only a means to an end. The tenants in remainder lost nothing when the premium ceased to be paid: on the contrary they gained by the addition of £40,000 to the capital. I find it very difficult to see how a person's "interest" in any real sense can cease unless by the cesser he loses something of actual or at least of potential value which he might have had if the deceased had lived longer. Whatever may have been the technical nature of the right of the tenants in remainder with regard to the premiums it was in substance only an ancillary right for the protection of their real interest which was to get in the £40,000. Once that interest required no further protection (because the money was paid) rights for its protection came to an end, but I cannot regard that as the cesser of an interest within the meaning of the Act. If this be right it is unnecessary to express any opinion about the decisions in *In re Hodson's Settlement*[4] and *Westminster Bank* v. *Attorney-General*.[5] In my judgment this appeal should be allowed.

My noble and learned friend, Lord Asquith of Bishopstone, is unable to be present this morning. He has asked me to say that he has read the speech which I have just delivered and that he agrees with it.

Appeal allowed.

Solicitors: *Norton, Rose, Greenwell & Co.*; *Solicitor of Inland Revenue.*

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[4] [1939] Ch. 343.

[5] [1939] Ch. 610.

ABDUL CADER . . . . . . APPELLANT;

AND

RAZIK AND OTHERS . . . . . . RESPONDENTS.

J. C.*

1952
Dec. 2.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Ceylon — Mahommedan law — Marriage — Validity — Hanafi sect — "Majority" for purpose of marriage—On attaining puberty—Whether wali necessary—Marriage and Divorce (Muslim) Ordinance, No. 27 *of* 1929, *as amended by No.* 9 *of* 1934 (*Legislative Enactments of Ceylon,* 1938, *c.* 99), *s.* 50.

For the purpose of marriage a Muslim in Ceylon attains "majority" on reaching the age of puberty. "Majority" for that purpose is not affected by the provisions of the Age of Majority Ordinance, 1865, of Ceylon, which makes 21 years the legal age of majority.

In a matter of marriage a Muslim in Ceylon is, by virtue of the provisions of section 50 of the Marriage and Divorce (Muslim) Ordinance (c. 99 of the Legislative Enactments, 1938), governed by the law of the sect to which he or she belongs, and accordingly the Mahommedan law as incorporated into the law of Ceylon includes the provision, which admittedly exists in general Mahommedan law, that a Hanafi girl who has attained the age of bulugh (puberty) can marry without the assistance of a wali or appoint whom she chooses to act as wali.

Judgment of the Supreme Court of Ceylon affirmed.

APPEAL (No. 37 of 1951) from a judgment of the Supreme Court of Ceylon (September 28, 1950) affirming a judgment and order of the District Court of Colombo (August 2, 1948) on a petition brought by the present appellant with regard to the guardianship of the person and custodianship of the property of his daughter Hameeda Sithy Zubeida, the fourth respondent.

The basic question which arose for determination on this appeal was whether a marriage entered into by Zubeida when she was just over 15 years of age was valid.

Zubeida was born on October 12, 1932, her father being A. H. M. Abdul Cader, the appellant, and her mother one Sithy Hajara, who died on December 17, 1932. The parents of Sithy Hajara, the maternal grandparents of Zubeida, were A. R. A. Razik, the first respondent, and his wife, Ameena Umma, the second respondent. Zubeida lived with them and was brought up by them from the date of her mother's death.

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* *Present:* VISCOUNT SIMON, LORD MORTON OF HENRYTON, LORD COHEN, and SIR LIONEL LEACH.

Sundry disputes having arisen as to the administration of properties alleged (some admittedly, but some disputably) to be properties to which Zubeida was entitled, the appellant, on March 14, 1947, filed in the District Court of Colombo the petition out of which this appeal arose, asking for the appointment of a guardian of the person of Zubeida and of a curator over her property. In that petition he suggested the third respondent—an adult married sister of Zubeida—as the guardian of the person and himself (being already the duly appointed administrator of Sithy Hajara's estate) as curator of her property.

On May 29, 1947, Zubeida's grandparents, the first and second respondents, filed a petition in the District Court praying for the dismissal of the appellant's petition, and alternatively for an order for the appointment of one Mohamed Fuard as curator of Zubeida's property and of the second respondent as guardian of the person and guardian ad litem of Zubeida.

At the hearing of the appellant's petition on October 31, 1947, the District Judge directed that a guardian ad litem of Zubeida should be appointed, and at a resumed hearing on December 5, 1947, the appellant accordingly submitted papers for such appointment. Zubeida being on that date allegedly incapable of attending court owing to illness, the proceedings were adjourned.

When the proceedings next came on for hearing on January 23, 1948, counsel appeared stating that he was instructed by a proctor for Zubeida, who, it was stated, had married one Rasheed bin Hassan on December 11, 1947, and was in consequence no longer in need of a guardian ad litem. For the appellant it was replied that the alleged marriage could not in law be valid as he, Zubeida's father, was the only person entitled by Muslim law to be her wali, and he had not been present at or given his consent to the alleged marriage; and further, that in any case marriage did not confer majority on a Muslim girl so as to dispense with the need for a guardian ad litem or a custodian of property. The proceedings were then adjourned.

At a subsequent hearing on February 3, 1948, it was agreed between the parties, and ordered by the court, that an inquiry should be held on those questions, being directed in the first instance to the issue as to the validity of the alleged marriage of Zubeida.

After the inquiry before him, when evidence was given and he was addressed by counsel, the District Judge by his order of August 2, 1948, held that the marriage of the fourth respondent was valid.

On appeal by the appellant to the Supreme Court (Jayetileke C.J. and Swan J.) the order of the District Judge was upheld, and a decree entered accordingly.

1952. October 15, 17, 20 and 21. *Pritt Q.C.* and *Stephen Chapman* for the appellant.

Christopher Shawcross Q.C., *Handoo* and *S. Amerasinghe* for the respondents.

December 2. The judgment of their Lordships was delivered by LORD COHEN. The proceedings in this matter originated with an application by the appellant for the appointment of a guardian of the person and a curator of the property of his daughter, the fourth respondent, but the only question to be determined on this appeal is the validity or invalidity of the marriage which took place on December 11, 1947, between the fourth respondent, who was then aged 15 years and two months, and one Rasheed bin Hassan.

The parties are Mahommedans. Mahommedans are divided into various sects, the two sects relevant to the issues in this appeal being the Shafi and the Hanafi. The fourth respondent was married as a member of the Hanafi sect, having appointed her uncle as her wali for the purpose of the marriage. In the Ceylon courts the appellant disputed the validity of the marriage on the following grounds: I. He alleged that the fourth respondent was a member of the Shafi sect and could therefore not be married without his consent as her wali or agent. II. He contended that even if she was a member of the Hanafi sect the marriage was invalid either: (*a*) because under Moslem law as applied in Ceylon even a Hanafi girl of 15 could not be married without the consent of her father as wali; or (*b*) because the rules that would otherwise apply to her under Mahommedan law were overridden by the provisions of the Age of Majority Ordinance, No. 7 of 1865 (cap. 53 of the Legislative Enactments of Ceylon, 1938), which he alleged makes 21 years the legal age of majority for all persons for all purposes.

The trial judge found as a fact that the fourth respondent was a Hanafi at the time of her alleged marriage, rejected the legal arguments advanced by the appellant and upheld the validity of the marriage. His judgment was confirmed by the Supreme Court on September 28, 1950, and it is from that decision that the appellant appeals to this Board.

At the hearing of the appeal Mr. Pritt, for the appellant, sought to advance a new legal argument which may be stated as follows. The fourth respondent was the child of Shafi parents. She was born a Shafi and could not become a Hanafi except by exercising a real choice with knowledge of the distinction between the two sects and declaring that choice. In any event, she could not, while a minor, change her religion without the consent of her father.

This argument was not advanced on behalf of the appellant in either court in Ceylon. It is essentially the kind of argument on which their Lordships would desire the assistance of the Ceylon courts, and their Lordships are not satisfied that if it had been advanced in the Ceylon courts no further evidence would have been admissible. In all the circumstances their Lordships do not consider that Mr. Pritt should be allowed to advance it before this Board. In face of this ruling Mr. Pritt admitted that he could not go behind the concurrent finding of the Ceylon courts that the fourth respondent was a Hanafi at the time of the alleged marriage.

Their Lordships have therefore only two points to determine. (1) Whether the Mahommedan law as incorporated into the law of Ceylon included the provision, which it was admitted exists in general Mahommedan law, that a Hanafi girl who had attained the age of bulugh (puberty) could marry without the assistance of a wali or appoint whom she chose to act as a wali. (2) Whether the Majority Ordinance overrode the provisions of the Mahommedan law as to marriage and thus made it impossible for the fourth respondent while under 21 to enter into a valid marriage contract, at any rate without the consent of her father.

On the second point their Lordships find themselves in complete agreement with the Supreme Court. Mr. Pritt called their attention to a number of authorities which indicated a difference of opinion in the courts of Ceylon on the question whether for all purposes a Muslim minor attained majority on reaching the age of puberty. Like the Supreme Court, their Lordships do not find it necessary to resolve this difference. In *Narayanen* v. *Saree Umma*[1] De Sampayo J. referred to his earlier decision in *Marikar* v. *Marikar*[2] and pointed out that

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[1] (1920) 21 C.N.L.R. 439.

[2] (1915) 18 C.N.L.R. 481.

"there are two kinds of 'majority' under Muhammadan law, "namely, one as regards capacity to marry without the intervention of a guardian, and the other as regards a general capacity "to do other acts as a major."[3]

Their Lordships agree with the Supreme Court that for the purpose of marriage a Muslim in Ceylon attains "majority" on reaching the age of puberty, and would add that none of the cases cited suggested a contrary conclusion.

There remains for decision only the first point. Mr. Pritt admits that under the Mahommedan law as laid down in the textbooks a Hanafi girl who attains the age of puberty does not require a wali and may appoint whom she chooses to act as wali, but he contends that this provision has not been incorporated into the law of Ceylon. He founds himself on the Mahomedan Code of 1806, which purported to record the usages of the caste in force in that year, and in particular on section 64, which provides that "a person wishing to marry, application must be "made to the bride's father and mother for their consent." But the Code of 1806 has been repealed; the place of those sections which dealt with intestate succession has been taken by the Muslim Intestate Succession and Wakfs Ordinance, No. 10 of 1931 (cap. 50 of the Legislative Enactments of Ceylon, 1938), and the place of those sections which dealt with marriage and divorce has been taken by the Marriage and Divorce (Muslim) Ordinance, No. 27 of 1929, as amended by Ordinance No. 9 of 1934 (cap. 99 of the 1938 Legislative Enactments). Section 50 of cap. 99 reads as follows: "The repeal of sections 64 to 102 "(first paragraph) inclusive of the Mahomedan Code of 1806, "which is effected by this Ordinance, shall not affect the Muslim "law of marriage and divorce, and the rights of Muslims thereunder." Mr. Pritt argued that notwithstanding this provision their Lordships must look at the repealed Code and on any matter covered by it must treat the Code as laying down the Mahommedan law which was incorporated into Ceylon. He found himself bound to admit that where the Code was silent on any matter recourse should be had to textbooks for the relevant Muslim law, but he argued that unless the Code was ambiguous on the point under consideration, recourse to the textbooks on any matter covered by the Code was not permissible. He relied on the observations of Schneider A.J. in *Rahiman Lebbe and Another* v. *Hassan Ussan Umma*,[4] where he said that recourse to treatise is only had "to elucidate some obscure "text in our written Mahommedan law, or in corroboration of "evidence of local custom." Their Lordships think that this was too narrow a limitation even when the Code was in force, but in any event they agree with the Supreme Court that the argument cannot prevail now that the Code has been repealed. As the Supreme Court pointed out, the Code was adopted at a time when it was thought that all Muslims in Ceylon were adherents of the Shafi sect, and when the Muslim Intestate Succession and Wakfs Ordinance (cap. 50) was adopted it was provided that the law applicable to the intestacy of a deceased Muslim domiciled in Ceylon should be the Muslim law governing the sect to which he belonged. In these circumstances the Supreme Court sum up their conclusion on this point in language which their Lordships would respectfully adopt: "The Marriage "and Divorce (Muslim) Ordinance, No. 27 of 1929, as amended "by Ordinance No. 9 of 1934, was proclaimed on January 1, "1937. By that time the legislature had openly recognized the "right of Muslims in certain matters to deal and be dealt with "according to the law governing the sect to which they belonged. "It was, therefore, in our opinion, unnecessary to say so in so "many words in section 50 of cap. 99. The words 'Muslim law' "in that section cannot mean anything more or less than the "Muslim law governing the sect to which the particular person "belongs. We would, therefore, hold that in a matter of "marriage or divorce a Muslim is governed by the law of the "sect to which he or she belongs."

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[3] 21 C.N.L.R. 439, 440.

[4] (1916) 19 C.N.L.R. 175, 185.

For these reasons their Lordships agree with the Supreme Court that a valid contract of marriage was entered into between the fourth respondent and Rasheed bin Hassan on December 11, 1947, and will humbly advise Her Majesty to dismiss the appeal. The appellant must pay the respondents' costs thereof.

Solicitors: *Darley, Cumberland & Co.; Burchells.*

MARVIN SIGURDSON . . . . . . Appellant; J. C.*

AND 1952 *July* 21.

BRITISH COLUMBIA ELECTRIC RAILWAY CO. LD. . . . . Respondent.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Canada (British Columbia)—Negligence—Motor-car—Collision—Liability—Contributory negligence—Principles applicable—Alleged misdirection.

The appellant, who wished to drive his motor-car from one side of a road to the other, after beginning to turn across had to wait for traffic passing on the other side, and in fact stopped his motor-car, after making the appropriate hand signals, on a street car track which ran down the centre portion of the road. A street car belonging to the respondent company collided with the appellant's motor car causing injury to him and damage to his car. On a claim by him for damages the evidence of the respondent's motorman, who had had an unobstructed view, was that he did not notice the appellant's car until he was about 75 feet away, that he then applied his brakes and sounded the gong, but could not avoid running into the motor-car. The jury found that the accident was caused solely by the negligence of the motorman in failing to keep a proper look-out, and that the appellant was not guilty of contributory negligence. Judgment was entered accordingly for the appellant. On appeal by the respondent, the Court of Appeal for British Columbia, before whom the finding of negligence on the motorman's part was not disputed, found the appellant and the respondent equally to blame and apportioned the damages accordingly.

On appeal by the appellant it was contended on behalf of the respondent that there had been misdirection by the trial judge in that, inter alia, he had failed to make clear to the jury that one party is not solely liable in a case where both parties have been negligent unless he saw and recognized the negligence of the other party leading to the danger and thereafter failed to avoid it when he could have done so by the exercise of reasonable care and skill. The respondent contended that where one party (A) actually knows of the dangerous situation created by the negligence of another (B) and fails by the exercise of reasonable care thereafter to avoid the danger A is, generally speaking, liable, but that if A by reason of his own negligence did not actually know of the danger or by his own negligence or deliberate act has disabled himself from becoming aware of the danger he can only be held liable for a proportion of the resulting damage:—

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* *Present*: Viscount Simon, Lord Normand, Lord Oaksey, and Lord Tucker.

J. C.
1952

MARVIN SIGURDSON v. BRITISH COLUMBIA ELECTRIC RAILWAY CO. LD.

Held, that no authority had been cited for such a far-reaching proposition which, if correct, would seem to provide the respondent in such a case as the present with a means of escaping its 100 per cent. liability by relying on the failure of the motorman to keep a proper look-out. Moreover, the proposition was directly contrary to the second of the rules propounded by Greer L.J. as useful tests in *The Eurymedon* [1938] P. 41. No criticism could properly be directed to the trial judge's charge to the jury on the ground that it was unfavourable to the respondent in that respect.

The language of Viscount Birkenhead in *The Volute* [1922] A.C. 129, 144–5, is particularly suited to the exposition to a jury of the principles which they have to apply in cases of collisions between vehicles on land, and is much to be preferred to attempts to classify acts in relation to one another with reference to time or with regard to the knowledge of one party at a particular moment of the negligence of the other party and his appreciation of the resulting danger and by such tests to create categories in some of which one party is solely liable and others in which both parties are liable.

Judgment of the Court of Appeal for British Columbia [1951] 3 D.L.R. 407, reversed.

APPEAL (No. 3 of 1952) from a judgment of the Court of Appeal for British Columbia (April 30, 1951) varying a judgment of the Supreme Court of British Columbia (December 13, 1950).

The following facts are taken from the judgment of the Judicial Committee: On November 20, 1948, the appellant brought an action in the Supreme Court of British Columbia claiming damages for personal injuries suffered by him on August 6, 1948, and for damage to his motor-car, by reason of the alleged negligence of the driver of a street car owned and operated by the respondent.

Having regard to the fact that the jury must be assumed to have taken a view of the facts favourable to the plaintiff wherever there was a conflict of evidence or room for doubt it would suffice to set out the facts proved by the plaintiff and his witnesses together with any evidence for the defence tending to support his case. They were as follows:—The accident occurred on August 6, 1948, at about 5.45 p.m. on Broadway in the City of Vancouver in broad daylight. Visibility was good and the road dry. The plaintiff was driving his motor-car on the south side of Broadway in an easterly direction. The defendant's street car was travelling on the right-hand set of lines in the centre portion of the road also moving in an easterly direction. The street car was at all material times to the rear of the plaintiff's motor-car, and the driver (or motorman as he was called) had an unobstructed view between his street car and the plaintiff's motor. The plaintiff was minded to turn to his left to cross to the north side of Broadway to get some gasolene at a garage on that side at a point about 75 feet beyond the intersection of Heather Street and Broadway. That would necessitate his crossing the track which the defendant's street car would follow. Before turning to his left the plaintiff observed the defendant's street car at the intersection of Broadway and Willow Street, a distance of 600 feet to the rear of his motor-car. There was no other eastbound traffic. At the same time he saw three or four motor-cars approaching in a westerly direction on the north side of Broadway. He judged he would not be able to pass safely in front of the first of these motor-cars, but observed a wide gap between the first and second of the cars through which he considered he could proceed with safety. The plaintiff accordingly gave the appropriate sign indicating his intention to turn to his left across the street car tracks and proceeded to do so. When on the track the gap in the westerly moving line of motor-cars closed up making it unsafe to proceed further. He accordingly stopped his car on the tracks, giving the appropriate hand signal. At this moment the street car was between 200 and 250 feet away to the west with a still unobstructed view. The plaintiff looked again at the westbound traffic, found it still unsafe to cross and so remained stationary where he was and glanced back again at the street car which was by now passing fast across the intersection of Heather Street. Seeing that he was then in imminent peril he attempted to back off the track, but before he could do so the street car struck him a violent blow dragging or pushing his motor-car a distance of some 60 feet and demolishing it to such an extent that it had to be sold for scrap.

The action was heard by Wood J. and a common jury and on December 13, 1950, judgment was entered for the plaintiff for $20,688.55 and costs, the jury having found that the defendant's driver was guilty of negligence which caused the plaintiff's injuries and that the plaintiff was not guilty of negligence which contributed to the accident.

The defendant appealed to the Court of Appeal for British Columbia both as to liability and quantum of damages, and on April 30, 1951, the Court of Appeal allowed the appeal in part, setting aside the verdict of the jury and finding the plaintiff and the defendant's driver equally to blame and apportioning the damages accordingly. The quantum was not disturbed. Sloan C.J.B.C. found there had been misdirection of the jury. Sidney Smith J.A. held that properly interpreted the verdict of the jury was in conflict with the evidence and was in substance perverse, and that in any event there had been misdirection. Bird J.A. agreed with the result and subsequently handed down his reasons in which he stated his concurrence with the views expressed by the Chief Justice.

All the judges in the Court of Appeal, having regard to the view they took, appeared to have felt no difficulty in substituting their own findings on matters of fact for the verdict of the jury without ordering a new trial.

The plaintiff now appealed to Her Majesty in Council asking that the judgment of the Court of Appeal be set aside and the verdict and judgment at the trial restored.

1952. May 21, 22, 26. *Harry C. F. Spring* (of the Canadian Bar) for the appellant. The respondent concedes that its motorman was negligent and does not attack the quantum of damages awarded, and the question in issue, therefore, is whether or not the appellant was guilty of negligence which contributed to the accident, and, if so, to what degree. It is contended that, irrespective of any directions that were given by the trial judge, the verdict was the only one that a jury, dealing with the whole matter on common-sense principles, could have reasonably reached on the evidence. The jury were, in fact, properly instructed by the trial judge. If the charge to the jury did contain anything which might be construed as a misdirection, it was cured by the summing-up as a whole. The trial judge did not, in fact, say categorically that *Davies* v. *Mann* [1] did apply; after referring to that case he merely indicated that it would have some application "if there was that sort of situation as in the "donkey case." [Reference was also made to *Davies* v. *Swan Motor Co.* (*Swansea*) *Ld. James, Third Party*,[2] and *Henley* v. *Cameron*.[3]] It is a question on the facts of each particular case whose fault caused the accident. On the evidence in this case the jury could and did reasonably find that the respondent's motorman was solely responsible for the accident, and that the appellant was not guilty of negligence at all.

[He was stopped.]

W. H. Q. Cameron (of the Canadian Bar) for the respondent. The propositions on which the respondent relies are: (1) The charge to the jury, when viewed in relation to the facts, leaves the impression that if the motorman was negligent in not seeing the appellant on the track or in not stopping sooner after he saw him, then the respondent is solely liable, in spite of any negligence on the appellant's part. It is a matter of impression. (2) The charge leaves the impression, when viewed in relation to the facts, that the appellant was "stuck" on the track in a position comparable to that of the fettered and unattended donkey in *Davies* v. *Mann*,[4] and therefore tended to confuse the jury between the law and the facts. (3) The trial judge failed to make clear to the jury that one party is not solely liable unless he saw and recognized the negligence of the other party which might lead to a danger, and then failed to avoid it when no reasonable man would have failed to avoid it. (4) The judge failed to tell the jury that the proper test of liability was, in the plain, ordinary common sense of the matter, whether both parties were partly at fault in causing the accident or whether it was only one. He failed to tell them that where there was no clearly severable line, and the negligence of each was inextricably mixed up, it was a matter of apportioning the negligence. There was misdirection not to have told them that. He not only gave them a wrong direction, but omitted to give them a proper direction. The appellant and the motorman in fact had equal opportunity of avoiding the accident which operated right up to the time when it happened. The appellant was not stuck on the track like the fettered and unattended donkey on the road in *Davies* v. *Mann*[4]; he was in his car with the engine running and, knowing the street car was coming behind him, he was free to stay on the track or, when the danger became imminent, to go ahead in safety. He voluntarily elected to take a chance. There was a complete absence of any "static position," as referred to by Viscount Simon in *Boy Andrew* (*Owners*) v. *St. Rognvald* (*Owners*).[5] There was ample evidence to support the view of all three judges in the Court of Appeal, who were unanimous in holding that the appellant was guilty of contributory negligence. Even if there was no misdirection, the action of the appellant was so grossly negligent that it should be found that the verdict of the jury was perverse on that point.

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[1] (1842) 10 M. & W. 546.

[2] [1949] 2 K.B. 291, 317.

[3] (1948) 65 T.L.R. 17.

The judge's charge to the jury left the impression that *Davies* v. *Mann*[6] meant that, if the street car motorman had the so-called last chance to avoid the accident, he alone would be liable. That is not the law. In the *Boy Andrew* case[7] Viscount

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[4] 10 M. & W. 546.
[5] [1948] A.C. 140, 149.
[6] 10 M. & W. 546.
[7] [1948] A.C. 140, 148–9.

Simon said: "The principle of *Davies* v. *Mann*[8] has often been "explained as amounting to a rule that when both parties are "careless, the party which has the last opportunity of avoiding "the results of the other's carelessness is alone liable. The "suggested test of 'last opportunity' seems to me inaptly "phrased and likely in some cases to lead to error . . . the "question, as in all questions of liability for a tortious act, is, "not who had the last opportunity of avoiding the mischief, but "whose act caused the wrong?" If the trial judge was going to direct on *Davies* v. *Mann*[8] at all, he should have made it applicable to both parties. The principle of *Davies* v. *Mann*[8] would appear to be that one party is certainly liable if he saw and recognized the position of the other party in time to do something about it and failed to do so. [Reference was also made to *Davies* v. *Swan Motor Co. (Swansea) Ld.*,[9] and *Toronto Transportation Commission* v. *Rosenberg*.[10]] If there is one part of the summing-up which misleads the jury it is immaterial how much of the remainder of it is good. If the law is that one has to search for the real or sole cause of the accident by looking to see if the motorman could have avoided the negligence of the appellant, then he must necessarily be solely responsible for the damage: *The Boy Andrew*.[11] If that is the law, then the respondent has not very strong grounds to criticize the summing-up in the present case. It is submitted, however, that whatever view of the evidence is taken, the appellant's negligence in deliberately and unnecessarily stopping his car on the track contrary to the traffic regulations and in face of the known danger of the approaching street car and the impossibility of getting through the west-bound traffic, and in voluntarily neglecting to move out of danger was a contributing factor to the accident in a degree of fault at least equal to that of the respondent's motorman.

A reply was not required.

July 21. The judgment of their Lordships was delivered by LORD TUCKER, who stated the facts set out above and continued: The defendant did not dispute either in the Court of Appeal or before their Lordships' Board the finding of negligence on its part contributing to the accident. The sole question in debate has been whether the verdict absolving the plaintiff from blame should stand.

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[8] 10 M. & W. 546.

[9] [1949] 2 K.B. 291, 317.

[10] (1950) 4 D.L.R. 449.

[11] [1948] A.C. 140, 148–9.

The British Columbia Contributory Negligence Act (R.S.B.C. 1948, c. 68) (which was passed before the corresponding United Kingdom Act) so far as material reads as follows: "Where "by the fault of two or more persons damage or loss is caused "to one or more of them, the liability to make good the damage "or loss shall be in proportion to the degree in which each "person was at fault: Provided that: (*a*) If, having regard to all "the circumstances of the case, it is not possible to establish "different degrees of fault, the liability shall be apportioned "equally."

The following by-laws and traffic regulations were relied upon by the defendant in support of its allegations of negligence against the plaintiff:—

Section 41 of the City of Vancouver Street and Traffic By-law No. 2849 provides:—"No driver of a vehicle shall drive such "vehicle from one side of a street to the other at any place "other than at an intersection or street, unless such driver shall "have first ascertained that such movement can be made without "obstructing traffic and can be made in safety having regard to "the nature, condition, and use of the roadway, and the traffic "which actually is at the time or might reasonably be expected "to be on the highway."

Section 3 (*j*) of the regulations pursuant to the Motor-Vehicles Act reads:—"Before turning, stopping, or changing the course "on the highway of any motor-vehicle, and before turning such "vehicle when starting the same, it shall be the duty of the "operator thereof first to ascertain whether there is sufficient "space for such movement to be made in safety, and the operator "shall give a signal plainly visible to the operators of other "vehicles of his intention to turn, stop, or change his course."

Reliance was also placed on section 38 of the Consolidated Railway Company's Act, 1896, which gives the right of way to a street car.

The evidence of the defendant's motorman was that he did not notice the plaintiff's car until he was at the Heather Street intersection (which would be about 75 feet away), that he then applied his brakes and sounded the gong but could not avoid running into the motor-car. The following questions were left to the jury and their answers thereto appear below:—

1. Q. "Was the motorman or the defendant company guilty "of negligence which contributed to the accident?"—A. "Yes."

2. Q. "If so, of what did such negligence consist?"—A.

"The brakes were not applied in sufficient time. The motorman "neglected to keep a proper look-out."

3. Q. "Was the plaintiff guilty of negligence which contri-"buted to the accident?"—A. "No."

The trial judge directed the jury fully and adequately with regard to what constitutes negligence in law, he explained to them the provisions of the Contributory Negligence Act, referred them to the traffic regulations relied on by the defendant and reminded them of the evidence of the witnesses. It was, however, contended by counsel for the respondent that he had misdirected the jury in four different respects.

1. It was said that his charge to the jury viewed in relation to the facts was calculated to leave the impression that if the motorman was negligent in not seeing the plaintiff on the track or not stopping soon enough when seen the defendant would be solely liable in spite of any negligence on the part of the plaintiff.

2. It was further submitted that the charge viewed in relation to the facts was calculated to create the impression that the plaintiff in the present case was "stuck" on the track in a position comparable to that of the fettered donkey in *Davies* v. *Mann*,[12] to which the judge had made reference.

3. It was submitted that the judge had failed to make clear to the jury that one party is not solely liable in a case where both parties have been negligent unless he saw and recognized the negligence of the other party leading to the danger and thereafter failed to avoid it when he could have done so by the exercise of reasonable care and skill.

4. And it was submitted that the judge failed to tell the jury that the proper test of liability in such cases as these is whether in the plain and ordinary common sense of the matter both parties were partly at fault in causing the accident or whether it was only one, and that if there was no clearly severable line between the two there should be an apportionment.

Before turning to examine the summing-up in the light of these criticisms it may be well to observe that the issues involved in this and other similar cases turn upon questions of fact, and that when a jury is the tribunal of fact to which those issues are committed their findings—subject to questions of misdirection or misreception of evidence—cannot be set aside unless they are of such a nature that, having regard to the evidence, no reasonable men could have arrived thereat. It is not for an appellate court, however much it may differ from the conclusions reached by the jury, to substitute its own findings for those of the jury.

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[12] (1842) 10 M. & W. 546.

There is, perhaps, no class of case which more nearly affects the average citizen in his daily life and which for this reason should, so far as possible, be kept free from legal subtleties and philosophical discussions on the theory of causation which, however fascinating, only tend to perplex and confuse the average juryman. Thirty years ago Viscount Birkenhead in *The Volute* [13] had occasion to observe: "Upon the whole I think that the "question of contributory negligence must be dealt with some- "what broadly and upon common-sense principles as a jury would "probably deal with it. And while no doubt, where a clear "line can be drawn, the subsequent negligence is the only one "to look to, there are cases in which the two acts come so closely "together, and the second act of negligence is so much mixed "up with the state of things brought about by the first act, that "the party secondly negligent, while not free from blame under "the *Bywell Castle* rule, might, on the other hand, invoke the "prior negligence as being part of the cause of the collision so "as to make it a case of contribution." And again,[14] "the "*Volute*, in the ordinary plain common sense of this business, "having contributed to the accident, it would be right for your "Lordships to hold both vessels to blame for the collision."

This was an Admiralty case, but now that common law courts have to apply the same principles to cases of collisions on land it seems to their Lordships that this language will be found particularly suited to the exposition to a jury of the principles which they have to apply in these cases, and is much to be preferred to attempts to classify acts in relation to one another with reference to time or with regard to the knowledge of one party at a particular moment of the negligence of the other party and his appreciation of the resulting danger, and by such tests to create categories in some of which one party is solely liable and others in which both parties are liable. Time and knowledge may often be decisive factors, but it is for the jury or other tribunal of fact to decide whether in any particular case the existence of one of these factors results or does not result in the ascertainment of that clear line to which Viscount Birkenhead referred—moreover, their Lordships do not read him as intending to lay down that the existence of "subsequent" negligence will alone enable that clear line to be found.

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[13] [1922] 1 A.C. 129, 144.

[14] Ibid. 145.

To turn now to the judge's charge to the jury. It is not, of course, possible or desirable to set it out in full. It covers 15 pages in the record and must be considered as a whole, but the criticisms of counsel for the respondent and the judgments of the Court of Appeal cannot be properly appreciated without setting out some parts in extenso. At p. 167 he dealt with the defendant's allegations of negligence against the plaintiff in these words: " Now the next question for you is whether or not the " plaintiff was guilty of negligence which contributed to the " accident, and if so, of what did such negligence consist? The " defendant says with regard to that that the action of the " plaintiff absolves the motorman and the company because of his " basic fault in turning in the middle of the block knowing that " the street car was coming down that grade and that he did " that contrary to the law, contrary to the regulations, which I " will refer to directly. That is the first thing the defendant " says—that he turned there knowing that that car was coming " down the grade behind him. The second thing is that he took " chances with the knowledge that he could not get across. The " street car had [?not] stopped and there was the traffic coming " the other way. You have heard all the evidence on that."

He then went on to refer to the traffic by-laws and regulations. He dealt with the onus of proof of negligence and contributory negligence, and went on to deal with the Contributory Negligence Act, the material provisions of which he read, and then at pp. 171 and 172 he used the language at which the criticisms are principally directed. He said: " Now, in dealing with the question " of negligence, I would like just to say this: it has been alleged " by the defendant that the plaintiff was the author of his own " wrong, that he drove out there wrongfully into the pathway " of the street car; but it does not follow necessarily from that " that he has no cause of action. There is a very old case which " is known as the donkey case." (The judge shortly stated the facts in *Davies* v. *Mann* [15]) and proceeded: " He [the defendant] " disputed the claim because, forsooth, the donkey had no business there. The court did not see it that way and they held " that if the jury was of opinion that the accident was ' caused " ' by the fault of the defendant's servant in driving too fast, " ' or, which is the same thing, at a smartish pace, the mere fact " ' of putting the ass upon the road would not bar the plaintiff " ' of his action. All that is perfectly correct; for, although the

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[15] 10 M. & W. 546.

" 'ass may have been wrongfully there, still the defendant was " 'bound to go along the road at such a pace as would be likely " 'to prevent mischief. Were this not so, a man might justify " 'the driving over goods left on a public highway, or even over " 'a man lying asleep there.'

" Here this plaintiff, according to his evidence, was more or " less stuck there. He says he was right across the track. The " defendant says that he was just at the edge of the track and " starting to make this turn with his hand out. It is for you to " decide on this evidence just what happened. If there was that " sort of situation as in the donkey case, if this man was there " in his car in the middle of the track, it would not justify the " motorman of the bus running over him. Once he saw and " realized the man was in trouble and in a dangerous place he " would naturally of course do his best to avoid the accident. " If he had paid no attention and ran over him the company " would be liable."

He then dealt with the evidence of the motorman to the effect that as soon as he perceived the motor-car and appreciated the danger he sounded his gong and applied his brakes but could not avoid running into the car. The judge went on: " Now the " question is whether or not there was any negligence on his part, " whether or not his negligence was such as to make the company " entirely liable, whether after seeing he was astraddle the car " tracks where he was bound to be run over if he did not stop " when he could have stopped, or whether or not he was negligent " at all. If he is not negligent at all, of course the action will " be dismissed. Or whether or not on the other hand he was " guilty of negligence which contributed to the accident in failing " to keep a proper look-out or not applying his brakes when he " should have, or that he was not properly trained. It is for " you to say some one or other of those things and if there is " more than one you should show one or more of those things " of which the motorman or company was negligent and that that " negligence contributed to the accident; and whether or not the " plaintiff also was guilty of some negligence which contributed " to the accident in any of the ways that have been put forward " by the defendant: that he was the author of his own injury " knowing that the street car was coming along there and driving " in front of it contrary to the by-law and contrary to the other " regulations; in crossing the street aside altogether from the " question of the regulations and taking chances of crossing there " under the circumstances."

Their Lordships consider that the judge's reference to *Davies* v. *Mann* [15] was a perfectly correct summary of the facts and statement of the effect of that decision, and can find nothing in the context to suggest that it amounted to a direction that as a matter of law if they accepted the plaintiff's evidence the present action must necessarily result in the defendant being solely responsible. The statement is prefaced by the observation "it "does not follow necessarily from that that he has no cause of "action." The emphasis is, of course, on the word "necessarily," as is made plain from what follows.

This disposes of the first two criticisms of counsel for the respondent. It was his third criticism on which he mainly relied, and it was on this that Sidney Smith J.A. in the Court of Appeal held that there had been misdirection. The proposition is that where one party (A) actually knows of the dangerous situation created by the negligence of another (B) and fails by the exercise of reasonable care thereafter to avoid the danger A is, generally speaking, solely liable, but that if A by reason of his own negligence did not actually know of the danger, or by his own negligence or deliberate act has disabled himself from becoming aware of the danger, he can only be held liable for a proportion of the resulting damage.

No authority was cited to their Lordships for such a far-reaching proposition, which, if correct, would seem to provide the respondent in such a case as the present with a means of escaping its 100 per cent. liability by relying on the failure of its motorman to keep a proper look-out. It can hardly be the consequence of such a collision that, if the respondent's motorman had kept a good look-out but had nevertheless continued to drive at an excessive speed, he might be treated as solely to blame, but that by failing to keep a good look-out until it was too late to avoid the accident the measure of the respondent's liability would be reduced. Moreover, the proposition is directly contrary to the second of the rules propounded by Greer L.J. as useful tests in *The Eurymedon*,[16] although it is true to say that it is not altogether easy to reconcile rules 2 and 4 as there stated. However this may be, their Lordships are satisfied that no criticism can properly be directed to the judge's charge to the jury on the ground that it was unfavourable to the defendant in this respect, since the judge seems to have accepted the contention of the defendant's counsel by directing the jury that in

[15] 10 M. & W. 546.

[16] [1938] P. 41.

considering whether the defendant company was solely liable they should consider whether the motorman did not stop when he could have after seeing the motor-car astraddle the tracks, which he contrasted with failure to keep a proper look-out or apply the brakes which might amount to negligence contributing to the accident.

Their Lordships are of opinion that the only criticism of this direction which can properly be made is that it was unduly favourable to the defendant.

They do not interpret the jury's answer as necessarily involving a finding that the failure to apply the brakes in time was due to the motorman not having seen the motor-car until too late to pull up. They may or may not have accepted the motorman's evidence that he did not see the motor-car until he was at Heather Street. They may have thought that he must have seen it earlier but none the less thereafter failed to keep its movements under sufficient observation or to apply his brakes to check speed before danger was imminent. It is idle to speculate about such matters where a case has been tried by a jury. On the other hand, the jury were entitled to come to the conclusion, taking a broad view of the case as a whole, that the negligence of the motorman was in the circumstances the sole cause of the accident irrespective of the precise moment at which he became aware of the danger.

In so saying, their Lordships must not be taken as in any way dissenting from the expressions of opinion of those judges in British Columbia who, with their knowledge of local conditions, have emphasized the importance of strict adherence to the traffic regulations, nor are they to be taken as indicating what view they might have formed on the facts if it had been open to them to review the evidence and re-try the case.

The last of the criticisms of the summing-up is hardly consistent with the earlier propositions contended for. It is, in effect, that the judge did not use the language of *The Volute* [17] which their Lordships have already indicated as being in their view useful and appropriate in such cases, but the mere omission to use this language does not of itself amount to a misdirection where the summing-up is, as in the present case, in all other respects full, accurate and careful.

Their Lordships have not considered it necessary to review the numerous authorities in which the so-called principle of *Davies* v.

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[17] [1922] 1 A.C. 129, 144–5.

Mann [18] (which in the present context amounts to no more than that the mere fact that the plaintiff's motor-car was wrongly on the track does not necessarily mean that the plaintiff has no cause of action) has been discussed. It suffices to state that this principle remains unaffected by the British Columbia Contributory Negligence Act and other similar enactments, though it may well be that in practice this legislation may have tended to encourage the application of those broad principles of common sense in the apportionment of blame unless the dividing line is clearly visible. Whether or not it emerges with clarity or is so blurred as to be barely distinguishable from the surrounding mass is a question of fact in each case for the tribunal charged with the duty of determining such questions.

For these reasons their Lordships will humbly advise Her Majesty that the appeal be allowed, the judgment of the Court of Appeal for British Columbia set aside and the verdict of the jury and the judgment of the Supreme Court of British Columbia in favour of the plaintiff for the sum of $20,688.55 restored.

The respondent company must pay the appellant's costs of the present appeal and of the appeal to the Court of Appeal for British Columbia.

Solicitors: *Blake & Redden; Linklaters & Paines.*

[18] 10 M. & W. 546.

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1953
Feb. 17.

ISAAC PENHAS . . . . . . APPELLANT;

AND

TAN SOO ENG . . . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL OF THE COLONY OF SINGAPORE.

Singapore—Mixed marriage—Non-Christians—Modified Chinese form of marriage ceremony—Validity—Common law monogamous marriage.

In accordance with the decisions in *Yeap Cheah Neo* v. *Ong Cheng Neo* (1875) L.R. 6 P.C. 381 and *Carolis De Silva* v. *Tim Kim* (1902) 9 S.S.L.R. Appdx. 8, the common law of England was in force in Singapore in 1937 except in so far as it was inapplicable and except in so far as it was necessary to modify it to prevent hardships upon the inhabitants who were entitled by the terms of the Royal Charter of 1826 to the exercise of their religions, manners and customs. There was in 1937 nothing in the religions, manners or customs of Jews or Chinese domiciled in Singapore which prevented them from contracting a common law monogamous marriage. Accordingly, a marriage celebrated in Singapore in 1937 in a modified Chinese form between a Jew and a non-Christian Chinese, both British subjects, who were domiciled and resident in Singapore, and neither of whom was married at the date of the ceremony, and who thereafter lived together as man and wife and had two children, constituted a valid common law monogamous marriage. While there was no form of a ceremony of marriage which was applicable to both parties, in adopting what appeared to be a composite ceremony—the wife worshipping according to her Chinese custom and the husband according to his Jewish custom—they indubitably intended the ceremony to constitute a valid marriage, and the evidence sufficiently proved that the parties intended, and that it was, a common law monogamous marriage and not a Chinese polygamous marriage.

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* *Present*: LORD MERRIMAN, LORD NORMAND, LORD OAKSEY, LORD REID and LORD ASQUITH OF BISHOPSTONE.

In a country such as Singapore, where priests were few and where there was no true parochial system, and where the vast majority were not Christians, it was neither convenient nor necessary that two persons such as the parties to the marriage in the present case should be required to call in an episcopally ordained priest to effect a marriage.

Wolfenden v. *Wolfenden* [1946] P. 61; 62 T.L.R. 10; [1945] 2 All E.R. 539, and the cases there cited, approved.

Judgment of the Court of Appeal of the Colony of Singapore affirmed.

Appeal (No. 21 of 1951) from a judgment of the Court of Appeal of the Colony of Singapore (March 24, 1950) dismissing an appeal by the appellant from a judgment of Gordon-Smith J. in the High Court of the Colony of Singapore (September 13, 1949) upon the trial of an issue ordered to be tried in a petition by the respondent for letters of administration of the estate of Abraham Penhas, deceased, against which the appellant had entered a caveat.

The following facts are taken from the judgment of the Judicial Committee: The issue to be tried was in the following terms: "Whether the petitioner Tan Soo Eng is or is not the "lawful widow of Abraham Penhas, and if the answer is in the "affirmative, when the said Tan Soo Eng married the said "Abraham Penhas." Both the trial judge and the Court of Appeal (Murray-Aynsley C.J., Evans and Laville JJ.) decided the issue in favour of the respondent, determining that she had been lawfully married to the deceased on or about December 22, 1937.

The question to be determined upon this appeal was whether the trial judge and the Court of Appeal were right in their conclusion that a marriage celebrated in Singapore between a Jew and a non-Christian Chinese in a modified Chinese form constituted a valid marriage according to the laws of the Colony.

Both the deceased and the respondent were British subjects and were at all material times domiciled and resident in Singapore. Neither of them was married at the date of the marriage ceremony relied upon by the respondent in December, 1937. From that date until the deceased was murdered by the Japanese, shortly after the fall of Singapore in February, 1942, they lived together as man and wife and had two children.

The appellant was a brother of the deceased, and was the executor of the last will and testament of the deceased, which was executed on April 3, 1936. He had not applied for probate of the will.

Abraham Penhas, the deceased, who was born in 1897, was a member of the family firm of Rahamin Penhas, carrying on business in Singapore, and in the year 1936 he went to England on a world tour. There he met a Jewess whom he wished to marry, but as his father did not consent he returned to Singapore unmarried.

In the following year he employed a Eurasian lady as a go-between with a view to marriage, and she introduced him to the respondent and her mother. They met in the Botanical Gardens of Singapore and conversed in Malay. Abraham asked the respondent's mother if she would consent to a marriage between him and the respondent, and the respondent's mother stipulated that it must be a proper wedding. He gave the respondent $500—to establish herself and her mother in a more suitable house than that in which they were then living, and he visited them for a few months at the house they took.

The respondent's evidence stated:—

"One day when he visited me he said that since we were "temperamentally compatible we should have an early marriage. "I suggested a church ceremony. He said such was not possible "in the Jewish Synagogue—because they would not allow any "but Jews to go in. Then I suggested a marriage according to "Chinese rites and he asked for details, and I told him—An "appointed day, before friends and relatives as witnesses, and of "course my mother would be there. . . . We decided to have "the marriage in my house at Sims Avenue and according to "Chinese rites. He was to pay the expenses. The date fixed "was in December, 1937, three or four days before Christmas. "Friends and relatives gathered together and deceased came at "11 a.m. with three of his friends, to 508 Sims Avenue. One "was an old Chinese gentleman and two Jews. I don't know "their names but could recognize them. I have not seen them "since the marriage. There [were] 16 or 17 guests, including "his three guests. The old Chinese gentleman brought by the "deceased solemnized the marriage. We stood before him. We "worshipped the Heavenly God and I worshipped with joss sticks "and he asked us each separately whether we were willing to be "man and wife, and we both said Yes.

"Deceased put a handkerchief over his head while I wor-"shipped. I bowed twice (curtsied) (stooped) holding joss sticks "(illustration by witness) and worshipped to Heaven. Deceased "told me it was their custom to put a handkerchief on the head. "He raised his right hand the whole time while I was worship-"ping. I was murmuring a prayer to Heaven for long life. I "could not understand what he was murmuring, it was in his "language.

"After worshipping, his two Jewish friends shook hands with "me and deceased also shook hands with me and kissed me. This "ceremony was in the outer hall and we then went into the "inner hall—my mother was sitting in a chair. We both went "before her—I knelt down and deceased bowed, and then "offered her a cup of tea—according to Chinese custom. We "had a feast immediately afterwards. After the feast the old "Chinese gentleman gave us his blessing before he left. He "[the deceased] came to live with me at Sims Avenue, passing "three to four nights there per week but he came there every day. "After that he permanently resided in Singapore—but would "sometimes go up-country on business but would tell me so "before going. He would write to me when away."

In cross-examination the respondent said: "The meeting in "the gardens lasted about three-quarters of an hour. Mother was "there, Mamma [the go-between] and deceased. He proposed a "marriage straight away. He asked my mother if she had any "objection to his not being a Chinese. My mother's reply was "there was no objection provided there was a proper marriage."

The respondent's mother also gave evidence and said, inter alia: "The three of us, deceased, daughter and self, had a dis-"cussion about the marriage. Deceased one day, on a visit, "asked my daughter: 'Shall we not be married?' and my "daughter said 'at any time.' He said a ceremony could not "possibly be performed in the Synagogue and my daughter said "it would have to be according to Chinese custom.

"'Abe agreed' and a date was then fixed. He said we "could invite our friends and relatives and he would invite his. "He gave $500—for the expenses. On the wedding day he came "with three friends, one an old Chinese gentleman and two "Jews. Our friends were present and it took place at Sims "Avenue.

"When he came, my daughter was upstairs but, hearing his "voice, she came down and the old Chinese gentleman congratulated her. The two Jews smiled and spoke to her in "English but I did not understand. Then he and my daughter "stood side by side before the Chinese gentleman, and the latter "spoke, referring to the auspicious occasion, etc., etc., and finally "asked both of them if they were willing to marry each other. "Both of them answered 'Yes.' Then he said: 'You are now "'husband and wife and I wish you a happy and life-long "'union. . . .'

"My daughter suggested a ceremony in Church but deceased "said a Jew was forbidden to enter. (Interpreter corrects it and "says she says 'a place of worship' and that witness suggested "the Synagogue.)

"Deceased replied that the Jewish Synagogue, his place of "worship, could not be entered except by Jews. Deceased said "this and my daughter suggested marriage according to Chinese "rites. He agreed. I do not remember that she suggested a "marriage according to Jewish rites outside a Synagogue. That "is all I can remember of the discussion."

The pastor in charge of the Chinese Christian Church also gave evidence and said that the respondent was already an attending member of his Church when he took up his duties there in 1939: that he visited her at her house after meeting her at Church: that he met her husband Abraham Penhas there and was introduced by him to the respondent as his wife, and saw a little girl there whom Abraham introduced as his child, and that he subsequently baptized their second child with their consent.

Upon those facts both courts in Singapore held that the respondent was the lawful widow of the deceased Abraham Penhas.

1953. January 12, 13, 14, 15, 19, 20, 21, 22, 26 and 27. *R. J. A. Temple Q.C.*, *Ian Baillieu* and *H. Forbes* for the appellant. The basic question is whether the deceased and the respondent were ever validly married. Marriage in the sense in which the term is used in Christendom and in the sense in which it is used by peoples of polygamous habit are different " things ": *Choo Eng Choon, decd., Choo Ang Chee* v. *Neo Chan Neo and Others* (the *Six Widows* case).[1] When the inquiry is, as here, whether two parties were lawfully married and one party is Chinese by race and religion and the other party is Jewish by race and religion and the rites performed at the alleged celebration of the union appear to be mixed Chinese and Jewish rites, the first step is to ascertain whether the evidence indicates that there was between the parties mutual consent to the " res " of the same union and, if so, what was the " res "; for the essential requirements of capacity and form governing the validity of the thing of a Christian, a Jewish and a Chinese marriage are all different. From the earliest days when Singapore was settled as a colony the English law regarded the native aliens as being entitled to their own customs in marriage matters. There were three Charters of justice, in 1807, 1826 and 1855, which introduced English law, and which are summarized in The Law of the Straits Settlements, by Sir Roland Braddell (1931) vol. 1, p. 69. That law was subject in its application, having regard to its direction that it should be applied to the native residents so far as their several religions and customs admitted, to modifications, and the broad principle governing the modifications was that the law should be applied so as to prevent it operating oppressively on the marriage customs of native alien races. The first case which considered the way in which the courts should approach the problem was *Reg.* v. *Willans*,[2] which is cited to establish the proposition that so far as Singapore is concerned, whether because of the Charters or because of the application of the comity of nations, it is the law that members of alien races are regarded as being governed by their own customary law: see also *Yeap Cheah Neo* v. *Ong Cheng Neo*,[3] *Choa Choon Neoh* v. *Spottiswoode*,[4] *Chulas and Kachee* v. *Kolson*[5] and *Hawah* v. *Daud*.[6]

Where two people of mixed custom wish to marry, the validity of what they do falls to be tested by the law of Singapore, and the question is, what rule does that law apply to test the validity? If they come from different customs the law of Singapore will deal with the matter as if it were the marriage of two foreigners of different domicile. That follows from the cases which have been referred to; they are to be regarded as foreigners temporarily resident in Singapore. In applying that test in relation to the capacity of the parties Singapore law will follow the line of reasoning to see whether by the "domicile" there is any incapacity in the one or the other which in the ordinary application of the rule regarding capacity is fatal. In the present case, applying this test where a Jew is concerned, there happens to be in Singapore a condition against marrying anybody except a co-religionist. *Chetti (Venugopal)* v. *Chetti (Venugopal)*[7] is to be distinguished. On the line of cases cited, the deceased had for the purposes of the creation of that foreign marriage such a disability as was fatal; the incapacity was that according to the law of Singapore he could not marry a person who was not a Jewess.

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[1] (1908) 12 S.S.L.R. 120, 125.

[2] (1858) 3 Kyshe's S.S.L.R. 16, 24.

[3] (1875) L.R. 6 P.C. 381, 392.

[4] (1869) 1 Kyshe's S.S.L.R. 216, 221.

[5] (1867) Wood's Oriental Cases 30

[6] (1865) Wood's Oriental Cases 26.

On the question whether the parties had the capacity to enter into the thing of a Chinese marriage, that is a question of foreign law, and it is conceded that the respondent had such capacity, but contended that the deceased had not. It is clear from the evidence that the deceased had no such capacity by Jewish law, but the appellant is content to assume that he had such capacity by Chinese law. The question then is whether, if he was entering into the thing of a Chinese marriage, his lack of capacity by Jewish law was by Singapore law a fatal incapacity to the validity of the marriage. It is contended that in accordance with the decision in *Brook* v. *Brook*,[8] which requires both parties to any marriage to have capacity by the laws of their respective domiciles before admitting its recognition, this marriage would be declared invalid for want of capacity on the part of the deceased. This is the attitude which the courts of Singapore ought to adopt ex comitate. Further, none of the judges below has found that the evidence of the Chinese experts proved that the ceremony was effective in Chinese law.

The evidence does not show that what the parties were ad idem for was a Christian marriage. It is contended that at the material date in Singapore the Christian Marriage Ordinance, 1936, c. 82, exclusively governed the validity of all Christian marriages, and that there was no compliance with the provisions of that Ordinance. The provisions of that Ordinance are similar in character to those of the Marriage Act, 1836. If the above contention on the scope of the Ordinance be wrong, it is necessary to examine the common law of England to ascertain whether or not under that law as imported into the colony there may still exist some unrepealed residuum on which the alleged marriage can found its validity. It is submitted that there is no such residuum. If the alleged marriage had taken place in England before Lord Hardwicke's Act of 1753, it would have amounted to no more than a contract of marriage per verba de praesenti, commonly called pre-contract, which has been established as not a marriage: *Reg.* v. *Millis.*[9] That case establishes that under the law of England, which was different from the Canon law, the parties to a marriage never had the right to marry themselves, but had to be married by a third person, who had to be a priest episcopally ordained. It has been argued against the appellant, however, that the rule in *Reg.* v. *Millis*[9] does not apply to British colonies and that the ceremony in the present case can be held valid on the authority of a line of cases of which *Maclean* v. *Cristall*[10] is a leading example. It is conceded that those authorities establish that in certain circumstances in the colonies parties may be validly married by a person who is not a " priest " within the meaning of the rule in *Reg.* v. *Millis.*[11] It is submitted, however, that those cases do not support the proposition that the parties can " marry themselves " by a contract of marriage per verba de praesenti. In Singapore in 1937 there was every facility for parties who wished to enter into a Christian marriage, including a lay ceremony before a marriage officer appointed under the Christian Marriage Ordinance, 1936.

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[7] [1909] P. 67, 87.

[8] (1861) 9 H.L.C. 193.

There was, therefore, no room for the application of the doctrine of adaptation of the English common law supported by the above authorities. In any event, no adaptation is permissible which would have the effect of resuscitating the formless marriage which was discarded by the Council of Trent, 1545, and which has never been part of the English common law. Further, it is contended that on the principle of adaptation, the rites of the Chinese religion conducted by a Chinese gentleman could not be sufficient or proper to effect a valid Christian marriage and to be an effective substitute for a ceremony conducted by a priest episcopally ordained. [Reference was also made to *Catherwood* v. *Caslon*[12] and *Catterall* v. *Sweetman.*[13]] Reliance is placed on *Maclean's* case[14] as showing that the practice existed, so far back as any cases can be discovered, of

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[9] (1844) 10 Cl. & F. 534.

[10] (1849) 7 Notes of Cases, supp. xvii.

[11] 10 Cl. & F. 534.

[12] (1844) 13 M. & W. 261.

[13] (1845) 1 Rob.Ecc.R. 304.

[14] 7 Notes of Cases, supp. xvii.

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celebrating marriages in the absence of clergy in as solemn a manner as the nature of the case permitted. There appears to be no case where it has been held that a Christian marriage was produced by the operation of the common law as modified or adapted, firstly, where the parties were not Christian, secondly, where there were no religious ceremonies, and thirdly, where the person before whom the consent was interchanged did not have some connexion with a religious body. What was adapted here had the effect of not bringing into being such a ceremony as could be said was as solemn as the nature of the case permitted for the purpose of bringing into existence a Christian marriage. It cannot be said that in Singapore in 1937 the celebration of mixed customary rites before a Chinaman can be a proper adaptation of the requirements of the English common law. The rule is formulated in Dicey's Conflict of Laws, 6th ed., p. 758, rule 168 (2) (iii). There is no case where the celebrant has been entirely dispensed with or his substitute has been a person of the equivalent of a Chinaman not Christian by religion, and where the ceremony in fact has not been of a Christian character.

Baillieu following: It has been held that "in questions of "marriage and divorce, it would be impossible to apply our law "to Mahomedans, Hindoos, and Buddhists, without the most "intolerable consequences, and it is therefore held inapplicable "to them": *Choa Choon Neoh* v. *Spottiswoode.*[15] The application of this doctrine to questions of capacity and form is merely secondary. The primary application of the doctrine is to prevent the courts from inferring from the union of two non-Christians consent to that type of union recognized as a Christian marriage, and thereby imprinting on that union the characteristics and status of a Christian marriage. Consent is essential to the conception of marriage, form is not, but under most systems of law it is introduced; and form is in practice almost universally an element going to validity. The view in *Carolis De Silva* v. *Tim Kim* [16] that "the law will presume a contract of marriage "from evidence of cohabitation with the habit and repute of "matrimony without any or with imperfect formalities for its "commencement" is not accepted. There cannot be a valid marriage except by reference to some system of law. *Brinkley* v. *Attorney-General* [17] is not a case of conflict of status; it is reconcilable.

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[15] 1 Kyshe's S.S.L.R. 216, 221.

[16] (1902) 9 S.S.L.R. (Appdx.) 8.

[17] (1890) 15 P.D. 76.

There is evidence that the marriage in the present case was not valid under Judaic law. "The courts of the colony have no "jurisdiction to declare the validity or otherwise of a Jewish "divorce": *Meyer* v. *Meyer.*[18] Jews in Singapore are treated as a distinct and alien people coming into the same category as Hindus and Mahomedans; this is only material on the point whether or not the deceased as a Jew had a capacity to contract a Chinese marriage, which is polygamous. [Reference was made to *In re De Wilton.*[19]] Polygamy is not part of the law of Singapore. The *Brook* v. *Brook*[20] rule applies in Christendom, where there is only one thing of marriage; but where there are different systems of jurisprudence, as in Singapore, these people must be notionally treated as resident or domiciled in their little bit of custom. In dealing with customs, it is from the Judaic law that the capacity of the deceased arose. It is only on the second issue—not on the common law marriage, which was open to all and sundry in Singapore—that the question of capacity arises. None of these questions on capacity arises if, on the first point, the parties consented to a monogamous marriage, and had the capacity to contract one, and complied with the requisites of form which are necessary for a valid monogamous marriage.

In the Court of Appeal Laville J. said that in the case of mixed marriages the Christian Marriage Ordinance provided a means of making a valid marriage where one party was a Christian and one was not. It is contended that it is equally available to the parties if they intend to create the thing of a Christian marriage in spite of the fact that neither be a Christian. The Ordinance, which renders invalid any marriage to which one party is a Christian unless there is compliance with the terms of the Ordinance, does not disentitle two non-Christians from availing themselves of its provisions. The following authorities are cited in connexion with the possibility of a Christian—a common law—marriage having come into existence: *Choa Choon Neoh* v. *Spottiswoode*[21]; *Lautour* v. *Teesdale*[22]; *Usher* v. *Usher*[23]; *Hyde* v. *Hyde and Woodmansee*[24]; *In re Bethell*[25]; *Warrender* v. *Warrender*[26]; *Nachimson* v. *Nachimson*[27] and *Srini Vasan (otherwise Clayton)* v. *Srini Vasan.*[28] Considered as a Christian marriage, there is no evidence that the parties consented to such a union; and it was void for that purpose for want of form since it did not comply either with the Christian Marriage Ordinance, 1936, or with the common law of England.

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[18] (1926) S.S.L.R. 24; (1927) S.S. L.R. 1.

[19] [1900] 2 Ch. 481.

[20] 9 H.L.C. 193.

[21] 1 Kyshe's S.S.L.R. 216, 221.

[22] (1816) 8 Taunt. 830.

[23] [1912] 2 Ir.R. 445.

[24] (1866) L.R. 1 P. & M. 130, 138.

[25] (1888) 38 Ch.D. 220.

[26] (1835) 2 Cl. & F. 488, 513.

[27] [1930] P. 217.

[28] [1946] P. 67.

If the Board finds in the appellant's favour that there was not a common law marriage, then capacity and form in respect of some other thing of marriage have next to be dealt with. The authorities to be cited in this connexion are quite irrelevant if the Board is of opinion that it was a common law marriage, but they are relevant if the Board is going to find a Chinese marriage. It is a question whether the law of Singapore does give capacity to anyone to enter into a polygamous marriage, or whether it only gives capacity to those people who came from a country of origin which practices polygamy. That must be answered with reference to the law of Singapore; that law is based on the law of England, which is that an Englishman cannot contract a polygamous marriage anywhere in the world. So far as capacity is concerned, there is a personal law in the colony. A Jew has no personal law in Singapore, and unless a man is by his personal law entitled to practise polygamy he is forbidden to do so. In the absence of personal law the law of Singapore is English law. If a polygamous marriage is to be valid it can only arise from the Charter, which only permits polygamy to a section of the community who, to avail themselves of it, have to assert a personal law. There was not here a good Chinese marriage. [Reference was made to *Khoo Hooi Leong* v. *Khoo Hean Kwee* [29]; *Khoo Hooi Leong* v. *Khoo Chong Yeok* [30]; *Yeap Cheah Neo* v. *Ong Cheng Neo* [31] and the *Six Widows* case.[32].] A person may contract a polygamous marriage if he can show that it is the custom for his and his co-religionists and people of similar origin to contract polygamous marriages. The marriage so contracted nevertheless would be invalid unless the other party also had capacity to contract, not necessarily for the same reason. On the facts of this case there is no evidence from which the right to contract a polygamous marriage can be inferred. Quite apart from custom, one of the requisites is that under the law the party should have the capacity to contract the marriage, and the deceased was not sui juris—if that expression may be used—for this purpose. There was no right in the deceased to contract a polygamous marriage because he was not within the scope of that section of the community as defined in the *Six Widows* case [32] for

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[29] [1926] A.C. 529, 543.

[30] [1930] A.C. 346.

[31] (1875) L.R. 6 P.C. 381, 394.

[32] 12 S.S.L.R. 120.

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whom polygamy was available. [Reference was also made to *Re Tay Geok Teat, Decd.*; *Sunny Tay* v. *Seow See Neo*,[33] *Chia Teck Leong and Others* v. *Estate and Trust Agencies (1927) Ld.*,[34] and *Chetti's* case.[35]]

Next, if it is alleged that this was a Chinese marriage the question arises whether it was valid for form—had it got the ceremony which should attach to it? The proposition is that no Chinese marriage is valid unless the wife is accepted by the husband's family; there must be reputation, and there must be intention plus recognition: *Re Lee Choon Guan, Decd. Lew Ah Lui (f)* v. *Choa Eng Wan and Others.*[36] The first reason in the printed case for the respondent is that "a marriage per verba "de praesenti was celebrated between the deceased and the "respondent," and there is no suggestion anywhere in their case that this was a valid Chinese marriage. It is submitted that this was not a marriage at all, and that the whole ceremony should be treated as a nullity.

Assuming against the appellant that the Board is inclined to find a common law marriage, the question is, did the parties validly contract that marriage? That depends on which of the two cases, *Reg.* v. *Millis*[37] and *Maclean* v. *Cristall*,[38] is applied: it is submitted that the rule in the former case should be applied. It would be a disaster if the rule in *Maclean* v. *Cristall*[38] were established: it would revive clandestine marriages and would strike ruthlessly at the marriage systems of the natives which they have devised for the protection of their community life.

That concludes the argument subject to the question of habit and repute. It is conceded that where there is some habit and repute preceded by the ceremony, the habit and repute relate to the ceremony. Secondly, the doctrine of habit and repute is a presumption of evidence, and where the facts and relationship of the parties are established in full, the possibility of other facts on which this presumption could arise is excluded. In this case the habit and repute of marriage was not established: *Sastry Velaider Aronegary* v. *Sembecutty Vaigalie*[39]; *In re Shepherd. George* v. *Tyer.*[40]

Colin Duncan and *A. L. Gordon* for the respondent. The main contentions are extremely short, but there are a number of subsidiary submissions. The first main submission is that the evidence establishes that in December, 1937, the deceased and the respondent contracted a valid common law marriage. By common law marriage is meant a marriage as defined by Lord Penzance in *Hyde* v. *Hyde*.[41] Secondly, if they did not contract a valid common law marriage, and only if they did not, then the same evidence establishes that they contracted a valid polygamous marriage. Thirdly, by way of confession more than admission, if the above submissions are wrong, then the evidence will not support any marriage at all.

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[33] [1934] S.S.L.R. 88.

[34] [1939] S.S.L.R. 94, 101.

[35] [1909] P. 67.

[36] [1935] S.S.L.R. 166, 176.

[37] 10 Cl. & F. 534.

[38] 7 Notes of Cases, supp. xvii.

[39] (1881) 6 App.Cas. 364, 371.

[40] [1904] 1 Ch. 456, 462.

The subsidiary submissions are: (a) In 1937 the law relating to marriages between persons, neither of whom was a Christian, was wholly governed by the terms of the Charter then in force. In other words, the Christian Marriage Ordinance and the Indian Marriage Acts not only applied exclusively to persons one of whom at least was a Christian, but also afforded no means of two non-Christians acquiring the married status. (b) In the Colony of Singapore the form necessary to produce a common law marriage was and is consent before a witness with such solemnity as the circumstances admitted. In other words, the presence of an episcopally ordained priest was not necessary. (c) On a true construction of the Charters Singapore is not a colony applying personal laws, whereas, for example, India, on the true construction of the relevant statute, is. In the statute in India there is an express direction to apply Hindu or Mahomedan law. (d) In any event, personal laws operate to remove hardship and not to create it or to restrict rights. (e) Whereas between persons of the same religion and usages the form of the marriage will give rise to a presumption of law that the status of marriage is that conferred by that form, there can be no such presumption in the case of mixed marriages, a fortiori in the case of a mixed form and in a colony where more than one status of marriage is recognized. The evidence here establishes that it was a mixed form, neither pure Chinese nor pure Jewish. (f) Where there is no presumption, evidence of intention is admissible and relevant, and evidence of the subsequent conduct of the parties is admissible and relevant to their intention. It is conceded that subsequent cohabitation could never displace evidence of consent. Where two people are found living together as man and wife there is a prima facie presumption that there was a marriage. (g) Where the form is consistent with the creation

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[41] L.R. 1 P. & D. 130.

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of more than one kind of status of marriage, there is a presumption against the creation of a status for which either one or other of the parties has no capacity. (h) Where there is no evidence of any marriage ceremony or where there is evidence of some ceremony, but the validity of that ceremony is uncertain, then reputation and subsequent cohabitation are material, and they give rise to a presumption of a valid marriage. It is submitted that Kekewich J. in *In re Shepherd* [42] cannot be upheld on the basis on which he sought to arrive at his conclusion: in that case it was impossible for those two persons to have been married by consent alone. [Reference was also made to *Ong Cheng Neo* v. *Yeap Cheah Neo and Others*.[43]] Where there is no ceremony or where the strict legality of the ceremony has not been proved, then subsequent cohabitation and reputation are material. The Board would be entitled to look at the evidence of the cohabitation—subsequent conduct is relevant and admissible: *Ussher* v. *Ussher*.[44]

The next proposition, (i) a mere technical one, but of importance, is that where a submission in law made to the Board is in any way dependent on evidence, the Board will be extremely reluctant to consider it unless it has been raised expressly in the courts below: *Connecticut Fire Insurance Co.* v. *Kavanagh*.[45] The last submission, (j), is that in the Colony of Singapore there are many varieties of mixed blood marriages, and domicile is the only safe test of capacity to contract any status of marriage recognized by the law of Singapore, and that to hold otherwise would lead to intolerable and impossible ex post facto inquiries which would lead to most extraordinary results. The law of Singapore should be deemed to be that persons domiciled in Singapore can avail themselves of marriages which the law of Singapore recognizes as valid. Looking at the evidence as a whole, it is submitted that it supported a monogamous marriage to the exclusion of a polygamous one. The judgments of the courts below were right and ought to be upheld.

Ian Baillieu, in reply. There is a presumption of law, if two parties are Chinese or if one happens to be a Jew and the other Chinese, that the rite governs the thing, and in the present circumstances it is not open to the respondent to put forward that she was contracting the thing of a common law marriage.

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[42] [1904] 1 Ch. 456, 462.

[43] (1872) 1 Kyshe's S.S.L.R. 326.

[44] [1912] 2 Ir.R. 445, 503–4.

[45] [1892] A.C. 473.

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February 17. The judgment of their Lordships was delivered by **Lord Oaksey**, who stated the facts set out above and continued:—The appellant's counsel contended, firstly, that the Christian Marriage Ordinance of Singapore, 1936, was applicable to the parties and that no marriage was valid unless celebrated in accordance with that Ordinance. Secondly, that the deceased had not the capacity to contract a polygamous marriage; thirdly, that the ceremony adopted was of such a character that it could give rise only to a polygamous marriage; fourthly, that there was no evidence which justified the inference that there had been a valid common law marriage; and lastly, that the equivocal nature of the ceremony and the other evidence did not establish the consensus ad idem necessary to prove a valid common law marriage of a monogamous nature.

Their Lordships do not find it necessary to set out the provisions of the Ordinance of 1936, as they think it clear that the Ordinance only applies to marriages in which one of the parties is a Christian, and it is not suggested that either party to the marriage in question was a Christian at the time. It is clear that at the material time no ordinance comparable with the Civil Marriage Ordinance of 1940 was in force. Nor do they think it necessary to deal in detail with the question whether a Jew domiciled in Singapore has capacity to form a polygamous marriage, as to which no evidence was given, or with the contention that the ceremony adopted, which was not entirely in accordance with Chinese rites, was only consistent with or raised a presumption of a polygamous marriage.

In the year 1875 their Lordships' Board had occasion to review the history of the Straits Settlements in *Yeap Cheah Neo* v. *Ong Cheng Neo*,[1] and held that the English common law was in force in Singapore in so far as it was applicable, but that the Charter of 1826 provided that the Court of the Colony was to exercise jurisdiction as an ecclesiastical court in so far as the religions, manners and customs of the inhabitants would admit.

The principal question to be decided is, therefore, whether there was in 1937 anything in the religions, manners or customs of Jews or Chinese domiciled in Singapore which prevented them from contracting a common law monogamous marriage. No case has been cited which suggests that mixed marriages between domiciled inhabitants of different religions or races cannot validly be contracted. On the contrary, *Carolis De Silva* v. *Tim Kim*[2] is authority that they can, and, indeed, the appellant's counsel did not contend that such marriages were impossible.

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[1] L.R. 6 P.C. 381.

[2] 9 S.S.L.R. (Appdx.) 8.

In accordance with these decisions their Lordships hold that the common law of England was in force in Singapore in 1937 except in so far as it was inapplicable and except in so far as it was necessary to modify it to prevent hardships upon the inhabitants who were entitled by the terms of the Charter to the exercise of their religions, manners and customs.

Their Lordships agree with the view expressed by Evans J. in the Court of Appeal in the present case that in a country such as Singapore, where priests are few and there is no true parochial system, where the vast majority are not Christians, it is neither convenient nor necessary that two persons such as the respondent and the deceased should be required to call in an episcopally ordained priest to effect a marriage. The case of *Wolfenden* v. *Wolfenden*[3] and the cases there cited are in point and were in their Lordships' opinion rightly decided.

There was no form of a ceremony of marriage in the present case which was applicable to both parties to the marriage, and accordingly they seem to have adopted a composite ceremony, the wife worshipping according to her Chinese custom and the husband according to his Jewish custom. Such a ceremony performed in the circumstances already stated was indubitably intended by the parties to constitute a valid marriage. The only question which in their Lordships' view admits of any doubt is the question whether the marriage intended by the parties to be constituted by the ceremony was a common law monogamous marriage or a Chinese polygamous marriage.

This question was not raised in the courts below and no questions were put to the respondent in cross-examination on the subject. Abraham Penhas was dead, and in such circumstances it would, in their Lordships' opinion, be altogether wrong to invalidate a marriage so solemnized, followed as it was by years of cohabitation as man and wife, and to bastardize the two children of the marriage, even if the other evidence were equivocal as to the status intended. But it is not necessary to decide the case on this narrow ground, for their Lordships hold that the evidence as it stands sufficiently proves a common law monogamous marriage. The wishes expressed by the respondent and her mother for a Church marriage, the reason why a modified Chinese ceremony was substituted, the presence of Jewish friends

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[3] [1946] P. 61; 62 T.L.R. 10; [1945] 2 All E.R. 539.

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at the ceremony, the words spoken by the Chinese gentleman who performed the ceremony as to a life-long union, the cohabitation as man and wife which followed and continued till the husband's death, and the introduction by the deceased to a Christian pastor of the respondent as his wife, and last, but not least, the baptism of their children as Christians with the approval of their father, all indicate that the spouses intended to contract a common law monogamous marriage.

Their Lordships will therefore humbly advise Her Majesty that this appeal ought to be dismissed. The appellant must pay the costs of the appeal.

Solicitors: *Peacock & Goddard; Sydney Redfern & Co.*

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Jan. 12.

NOORUL MUHEETHA . . . . . APPELLANT;

AND

SITTIE RAFEEKA LEYAUDEEN AND OTHERS RESPONDENTS

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Ceylon—Mahomedans—Gift of immovable property—Fidei commissum —Acceptance—Governed by Muslim law—Authority of mother of infant donee to accept.

Mahomedans in Ceylon are governed by their own personal law as it subsisted under the ancient Government of the United Provinces except so far as it may have been altered by statutory enactment. Accordingly, Muslim law, not Roman-Dutch law, governed, in the matter of acceptance, a gift of immovable property made by a Mahomedan in favour of minors, which their mother had purported to accept on their behalf, although there was embodied in the deed conveying the property a fidei commissum as known to Roman-Dutch law—which is completely alien to Muslim jurisprudence—for the benefit of the donees' children. The intention of the donor that Roman-Dutch law should apply in determining who could accept the gift on behalf of the minors would not be a relevant factor in determining the authority of the minors' mother; the question of her authority to accept the gift depended on the proper law applicable under the law of Ceylon in determining the capacity of infants and the authority of guardians to enter into binding agreements on their behalf.

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* *Present*: VISCOUNT SIMON, LORD MORTON OF HENRYTON, LORD COHEN and SIR LIONEL LEACH.

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While under Muslim law as administered in India a mother is not a person who has inherent authority as a guardian of the property of her infant children, it is by no means clear that that provision of Muslim law has found acceptance in Ceylon, and the Board were not prepared to dissent from the conclusion of the Supreme Court of Ceylon in this case that under the Muslim law as received in Ceylon and in the circumstances of the particular case, the mother had the necessary authority to accept the gift.

Observations by the Board, in view of the conflicting state of the authorities as to the extent to which and the form in which general Muslim law has been received into Ceylon, on the desirability of resolving the doubts by early legislation.

Judgment of the Supreme Court of Ceylon affirmed.

Appeal (No. 38 of 1951) from a judgment and decree of the Supreme Court of Ceylon (July 26, 1950) affirming a judgment and decree of the District Court of Colombo (May 31, 1945) whereby it was adjudged and decreed that the respondents were the lawful owners of certain land in Colombo.

The following introductory statement is taken from the judgment of the Judicial Committee. The parties in this case were Mahomedans residing in Ceylon. The appeal raised a question of considerable difficulty, namely, whether Roman-Dutch law or Muslim law governed, in the matter of acceptance, a gift of immovable property made by a Mahomedan in favour of minors, there being embodied in the deed conveying the property a fidei commissum for the benefit of the donees' children. A fidei commissum was well known in Roman-Dutch law, which was the basis of the law of Ceylon, but it was completely alien to Muslim jurisprudence.

The deed with which the appeal was concerned was executed by Saffra Umma, the paternal grandmother of the respondents, on June 28, 1927. The donor was the widow of one Meera Lebbe Marikar Idroos Lebbe Marikar. There were two sons of the marriage, Idroos Lebbe Marikar Mahomed Sathuk, the defendant in the action which gave rise to the appeal, and Idroos Lebbe Marikar Mahomed Zain, the father of the respondents, who died before the execution of the deed. By it the donor conveyed certain immovable property in Colombo to the respondents in equal shares, subject to the reservation of a life interest to herself, with a fidei commissum for the benefit of the children of the donees on the death of their parents. All the donees were then minors. Their mother, Fatheela Umma, purported to accept the gift on their behalf in these words: "And these presents further "witness that I Sheka Marikar Fatheela Umma who is the "mother of the said donees do hereby thankfully accept the "foregoing gift for and on behalf of the said donees who are all "minors."

The deed also contained this statement: "And the said Idroos "Lebbe Marikar Mahomed Sathuk who is the paternal uncle of "the said donees doth hereby renounce all and every right "interest or claim whatsoever which he may or shall have in "respect of the said premises hereby gifted adverse to them and "in the event of any question arising as to the validity of these "presents by reason of the said donees not being put into possession of the said premises according to law the said Idroos Lebbe "Marikar Mahomed Sathuk hereby agrees not to take any objection whatsoever to his advantage or take any other steps "whatsoever detrimental to the interests of the said donees in "respect of the premises hereby conveyed."

It was common ground that that clause did not operate to estop the defendant from asserting title to the property. The deed was signed by the donor, the defendant and the minors' mother, and was certified by a notary public. It was accepted that it embodied a fidei commissum as known to Roman-Dutch law.

On February 4, 1928, Saffra Umma executed a document by which she purported to revoke the deed of gift executed by her in favour of the respondents and to grant the property to the defendant for his life and after his death to his son Mohamed Sathuk Mohamed Huzain. On December 6, 1929, Saffra Umma died, and upon her death the defendant went into possession of the property.

On September 27, 1942, the respondents, who then were all of full age, instituted in the District Court of Colombo the action for a declaration that they were entitled to the property and for a decree for possession. By a judgment dated May 31, 1945, the District Judge granted the reliefs sought by the respondents. The defendant appealed to the Supreme Court, but during its pendency he died, and his widow, the appellant before their Lordships, was substituted in his place.

At the trial the defendant conceded that inasmuch as the deed of June 28, 1927, created a fidei commissum it was governed by Roman-Dutch law, but he contended that there had been no valid acceptance, because the parties to the deed were Mahomedans and under Muslim law a mother was not recognized as a natural guardian of her children in matters concerning property. He also maintained that there had been a valid

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revocation of the deed of gift. The District Judge decided against the defendant on both the points. He held that once it was admitted that the deed created a fidei commissum the transaction as a whole must conform to the requirements of Roman-Dutch law, and under that law a widowed mother could validly accept a gift on behalf of her minor children. He rejected the second contention on the ground that the deed did not reserve to the donor a right of revocation.

In the Supreme Court the only argument advanced in support of the appeal was that the deed of gift was bad for want of an acceptance valid under Muslim law. The court (Dias S.P.J. and Pulle J.), in agreement with the District Judge, held that the question of validity had to be determined solely within the frame of the Roman-Dutch law, and that under that law the respondents' mother had authority to accept the gift on their behalf. The judges considered that even if that conclusion were wrong the defendant was not entitled to succeed, as it had not been shown that according to Muslim law as administered in Ceylon a Muslim widow could not be deemed to be the guardian of her minor children. They were of the opinion that before the principle of Muslim law on which the appellant relied could be applied there must be a cursus curiae in favour of its application in Ceylon. The result was that the appeal was dismissed on the ground that the defendant was not entitled to have recourse to Muslim law to defeat the respondents' claim that Fatheela Umma was empowered by the general law of the land to accept the gift.

The appellant appealed.

1952. October 13, 14, 15. *Quass Q.C.*, *Dingle Foot* and *S. Canagarayar* for the appellant.

Stephen Chapman for the respondents.

The following cases were cited in the course of the argument: *Ukku* v. *Rankiri* [1]; *Aliya Markiar Abuthahir* v. *Aliya Marikar Mohammed Sally* [2]; *Weerasekera* v. *Peiris* [3]; *Fernando* v. *Weerakoon* [4]; *Wellappu* v. *Mudalihami* [5]; *Fernando* v. *Cannangara* [6]; *Silva* v. *Silva* [7]; *Imambandi* v. *Mutsaddi* [8]; *Abdul Rahiman* v. *Ussan Umma* [9]; *Junaid* v. *Mohideen* [10]; *In re Wappu Marikar*

[1] (1908) 11 C.N.L.R. 212.
[2] (1942) 43 C.N.L.R. 193.
[3] [1933] A.C. 190.
[4] (1903) 6 C.N.L.R. 212.
[5] (1903) 6 C.N.L.R. 233.
[6] (1897) 3 C.N.L.R. 6.
[7] (1908) 11 C.N.L.R. 161.
[8] (1918) L.R. 45 I.A. 73.
[9] (1916) 19 C.N.L.R. 175.
[10] (1932) 34 C.N.L.R. 141.

and his Wife[11]; *Mohamed Cassim* v. *Abdul Jabbar*[12]; *Assanar* v. *Hamid*[13]; *Suna Meah* v. *S. A. S. Pillai*[14]; *Amjad Khan* v. *Ashraf Khan*[15]; *Sultan* v. *Peiris*[16]; *Kadija Umma* v. *Meera Lebbe*,[17] and *Sule Amma* v. *Mohammado Lebbe Padily*.[18]

1953. January 12. The judgment of their Lordships was delivered by SIR LIONEL LEACH, who stated the facts set out above and continued:—In the course of his judgment (with which Dias S.P.J. agreed) Pulle J. referred to the judgment of the Board in *Weerasekera* v. *Peiris*.[1] In that case a Mahomedan resident in Ceylon executed a deed purporting to give to his son immovable property in Colombo. The gift was subject to conditions which were inconsistent with a gift recognized by Muslim law, but it created a fidei commissum as known to Roman-Dutch law. It was held that the gift was not invalid on the ground that possession had not been given to the donee as required by Muslim law. In delivering the judgment of the Board Sir Lancelot Sanderson said[2]:

"It was not disputed that the last mentioned provisions "constituted a fidei commissum according to Roman-Dutch law, "but, as already stated, it was contended, on behalf of the "respondent, that inasmuch as the terms of the first part of the "deed purported to constitute a gift inter vivos between "Muslims, Mahomedan law must be applied thereto, and as "possession of the premises was not taken by the son during the "father's life, the gift was invalid and the fidei commissum, "which was based on it, also failed.

"Their Lordships are not able to adopt this contention of the "respondent, and upon the true construction of the deed, having "regard to all its terms, they are of opinion that the father did "not intend to make to the son such a gift inter vivos as is "recognized in Mahomedan law as necessitating the donee "taking possession of the subject-matter during the lifetime of "the donor, but that the father intended to create and that he "did create a valid fidei commissum such as is recognized by the "Roman-Dutch law."

Their Lordships respectfully agree with these observations, but do not find them of assistance in the decision of the present case. In *Weerasekera* v. *Peiris*[1] the Board were considering the effect of the deed and held that it was to be construed and take effect in accordance with Roman-Dutch law. They were not concerned with the very different question whether a person purporting to accept a gift of immovable property on behalf of infant donees had in fact authority so to do. Their Lordships are prepared to accept that the donor, under the deed of June 28, 1927, intended that Roman-Dutch law should apply in determining who could accept the benefaction on behalf of her grandchildren, but their Lordships are unable to agree that the intention of the donor is a relevant factor in determining the authority of the mother. If an agent purports to accept a gift on behalf of a principal, his authority depends not on anything contained in the deed of gift but on the validity of the instrument or act alleged to confer the authority. So the question of a mother's authority to accept a gift on behalf of her infant children must depend not on the intention of some other party to the deed of gift but on the proper law applicable under the law of Ceylon in determining the capacity of infants and the authority of guardians to enter into binding agreements on their behalf. There is no suggestion in the present case that the transaction was not for the benefit of the infants, but if the argument advanced on behalf of the respondents, that the intention of the donor was relevant, were to prevail, it is obvious that an infant might be deprived of the protection which the law as to guardianship was intended to give him or her, and might be saddled with a burdensome property involving him or her in heavy liabilities.

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[11] (1911) 14 C.N.L.R. 225.
[12] (1951) 53 C.N.L.R. 495.
[13] (1948) 50 C.N.L.R. 102.
[14] (1932) I.L.R. 11 R. 109.
[15] (1929) L.R. 56 I.A. 213.
[16] (1933) 35 C.N.L.R. 57.
[17] (1903) 7 C.N.L.R. 23.
[18] (1907) 10 C.N.L.R. 109.
[1] [1933] A.C. 190.
[2] Ibid. 199.

The respondents relied on the decision of the Supreme Court of Ceylon in *Abdul Rahiman* v. *Ussan Umma*.[3] In that case the question at issue was whether an ante-nuptial contract regulating succession to property entered into between Mahomedans in Ceylon was valid. The court upheld its validity notwithstanding that it was " a document foreign to the principles of Muhammadan " law." In the course of his judgment Ennis J., when referring to a document creating a fidei commissum, said[4] " it would seem " that the Muhammadans in Ceylon have adopted and followed " the general law of Ceylon in executing such documents." This case, however, carries the matter no further than the decision of this Board already cited: the mind of the court was not directed to the question of the authority of a person purporting to execute the contract on behalf of one of the parties thereto. What, then,

[1] [1933] A.C. 190.
[3] 19 C.N.L.R. 175.
[4] Ibid. 178.

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is the law applicable in determining the authority of the mother to accept the gift on behalf of her infant children? If Roman-Dutch law were applicable, it is plain that as she was not the donor she would have the requisite authority (see, e.g., *Fernando* v. *Weerakoon*[5]; *Silva* v. *Silva*[6]). But their Lordships are of opinion that Roman-Dutch law is not applicable. The authorities establish that Mahomedans in Ceylon are governed by their own personal law as, to quote the proclamation of September 23, 1799, it "subsisted under the ancient Government "of the United Provinces" except, of course, so far as the same may have been altered by statutory enactment.

There remains for consideration, what is the law applicable in Ceylon to the question who is the natural guardian of the property of a Mahomedan infant? There is no doubt that under Muslim law, as administered in India and laid down in the textbooks written by Indian authorities on the subject, a mother is not a person who has inherent authority as a guardian of the property of her infant children, but it is by no means clear that this provision of Muslim law has found acceptance in Ceylon. The trial judge expressed no opinion on the point, and had their Lordships to reach a conclusion on the matter without assistance from a court in Ceylon they might have felt considerable hesitation in holding that the general rule of Muslim law was not applicable. The point was, however, argued in the Supreme Court, who reached the conclusion that under the Muslim law as received in Ceylon, and in the circumstances of the particular case, the mother had the necessary authority to accept the gift. Their Lordships are not prepared to dissent from this conclusion. They would, however, observe that the authorities as to the extent to which and the form in which general Muslim law has been received into Ceylon seem very conflicting, and they would venture to hope that the question of resolving by legislation the doubts which this conflict of authorities must create may receive early attention.

For the reasons above stated their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the costs of the appeal.

Solicitors: *Lee & Pembertons; Smiles & Co.*

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[5] 6 C.N.L.R. 212.

[6] 11 C.N.L.R. 161.

JOSEPH ORAKWUE IZUORA . . . APPELLANT;

AND

THE QUEEN . . . . RESPONDENT.

J. C.*

1953
March 16.

ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL.

West Africa—Contempt of court—Counsel—Absence from court in disregard of direction to attend—Discourtesy—Not a contempt.

Appeal—Jurisdiction—Contempt of criminal nature—"Conviction"—West African Court of Appeal Ordinance, Laws of Nigeria, 1948 *Rev., c.* 229, *s.* 10.

The appellant, a barrister practising in Nigeria, at the conclusion of the hearing of a divorce case in which he had represented the respondent in those proceedings, and in which judgment was reserved until the following day, applied that he might be excused from attendance on the next day. His application was granted. Counsel for the petitioner then asked that he also might be excused, and thereupon the judge, stating that the court could not carry on in the absence of counsel for both parties, withdrew the appellant's permission and directed that both counsel should attend next day. At the sitting of the court on the following day the appellant was absent and no communication from him had been received by the court. The appellant having been summoned to show cause why he should not be committed for contempt of court, the judge held that his absence from the court without leave amounted to a contempt and fined him £10 and ordered that in default he should be imprisoned for two months.

An appeal by the appellant to the West African Court of Appeal was struck out on the ground of lack of jurisdiction, that court holding, following their own decision in *In re Poku and Another* given a few days earlier (November 16, 1951), that in such a matter as the present "it is apparent that no appeal can be brought under "section 10 of the West African Court of Appeal Ordinance, "c. 229," which provides that "a person convicted by or in the "Supreme Court . . . may appeal to the Court of Appeal" in specified circumstances. The Court of Appeal were of the opinion that the order made against the appellant was not a "conviction" within the meaning of section 10 of the Ordinance. On appeal:—

Held, first, that the appellant's conduct was treated by the judge as being contempt of a criminal nature (see *Reg.* v. *Gray* [1900] 2 Q.B. 36; 16 T.L.R. 305), and that the order made by him, including the order for imprisonment in default of payment of the fine, was a "conviction" within the meaning of section 10 of the Ordinance from which, if the appellant's conduct amounted to contempt, an appeal might have been taken to the West African Court of Appeal.

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* *Present*: LORD PORTER, LORD TUCKER, and LORD ASQUITH OF BISHOPSTONE.

In re Poku (supra) and the present case held wrongly decided in the West African Court of Appeal.

Held, secondly, however, that the appellant had not been guilty of contempt. It was not every act of discourtesy to the court by counsel which amounted to contempt, nor was conduct which involved a breach by counsel of his duty to his client necessarily in that category, and in the present case the appellant's conduct was clearly discourteous, and might perhaps have been in dereliction of his duty to his client, but it could not properly be placed over the line that divided mere discourtesy from contempt.

Parashuram Detaram Shamdasani v. *King-Emperor* [1945] A.C. 264, 270; 61 T.L.R. 448 applied.

Order of the judge in the Supreme Court set aside.

APPEAL (No. 29 of 1952), by special leave, from an order of the West African Court of Appeal (November 23, 1951).

The following facts are taken substantially from the judgment of the Judicial Committee. The appellant was a barrister practising in Nigeria. On September 18, 1951, Manyo-Plange J., sitting in the Supreme Court of Nigeria in the Benin Judicial Division, fined the appellant £10 and ordered that in default he be imprisoned for two months for contempt of court.

The appellant appealed to the West African Court of Appeal who, on November 23, 1951, struck out the appeal on the ground of lack of jurisdiction, considering themselves bound by a previous decision of that court in the case of *Poku and Another*[1] given seven days earlier on November 16, 1951. The appellant obtained special leave to appeal to Her Majesty in Council by order dated June 24, 1952. No case was delivered on behalf of the respondent and counsel for the Crown was heard only on the question of costs.

The circumstances in which the order appealed from came to be made were as follows. On September 4, 1951, at the conclusion of the hearing of a divorce case in which the appellant represented the respondent in those proceedings, judgment was reserved by the trial judge, Manyo-Plange J., until the following day. The appellant thereupon applied to the judge that he might be excused from attendance next day. His application was granted. Counsel for the petitioner then asked that he also might be excused. Thereupon the judge stated that the court could not carry on in the absence of counsel for both parties, and in the circumstances the appellant's permission was withdrawn and counsel for both parties were to attend next day. At the sitting of the court next day counsel for the petitioner was present but the appellant was absent and no communication from him had been received by the court.

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[1] W.A.C.A., Nov. 16, 1951.

The judge ordered that the appellant be summoned to attend the court to show cause why he should not be committed for contempt. Accordingly, on September 10 a summons was issued, and was later duly served on the appellant, calling on him to appear before the court to show cause why he should not be committed for contempt of court; the contempt being: " Your failure, " without leave of the court, to attend the court sitting at Okene " on Wednesday, September 5, 1951, in suit No. B/34/50—Cole " versus Cole—in which you were engaged as counsel for the " respondent, in defiance of the court and in disobedience of an " order of court made on Tuesday, September 4, 1951, for counsel " for the parties to appear at the resumed hearing on September " 5, 1951."

On September 18 the appellant duly attended the court and was represented by counsel, who submitted on his behalf that no contempt was intended and that there had been a misunderstanding. The judge, in giving judgment, observed that but for the appellant's inexperience he would not have hesitated to commit him to prison. He fined him £10 and ordered that in default he be imprisoned for two months.

In support of his appeal to the West African Court of Appeal the appellant swore an affidavit in which he set out at length the circumstances in which he came to absent himself. It was not necessary for the purposes of the present appeal to refer thereto. By his notice of appeal he submitted, inter alia, that his action in the circumstances did not and could not amount to contempt of court. As previously stated, the Court of Appeal struck out the appeal for want of jurisdiction. They held that the order of the judge was not a " conviction " within the meaning of section 10 of the West African Court of Appeal Ordinance, chapter 229 of the 1948 Revision of the Laws of Nigeria, which dealt with appeals in criminal cases and gave a right of appeal from a conviction in certain circumstances.

1953. February 18, 19. *S. Cope Morgan Q.C.* and *F. R. McQuown* for the appellant. The appeal raises two points: first, a personal question of great importance to the appellant, namely, whether he has been guilty of contempt of court; and secondly, a question of principle of special and general importance to the courts of West Africa, namely, whether the West African Court of Appeal has jurisdiction to hear appeals from sentences such as that imposed on the appellant. Contempt of court means some obvious, blatant interference with the administration of justice or some abuse of the judge as a judge which brings him into contempt in the ordinary way. This case does not come near what has been held to be contempt of court. Judgments have frequently been given in the absence of counsel who conducted the case. The nature of the act here was certainly not one which interfered with the administration of justice, because the judge did in fact give judgment. "The object of the discipline enforced "by the court in case of contempt of court is not to vindicate the "dignity of the court or the person of the judge, but to prevent "undue interference with the administration of justice": *Helmore* v. *Smith*.[1] That is the test to be applied, and in *Helmore's* case[1] he was definitely in defiance of the court. In *Reg.* v. *Gray*[2] Lord Russell of Killowen C.J. laid down a definition to which frequent reference has been made since: "Any act "done or writing published calculated to bring a court or a judge "of the court into contempt, or to lower his authority, . . . "any act done or writing published calculated to obstruct or "interfere with the due course of justice or the lawful process "of the courts is a contempt of court." That passage has been applied in two cases before this Board: *Ambard* v. *Attorney-General for Trinidad and Tobago*[3] and *Perera* v. *The King*.[4] What was done in the present case was far less offensive than what happened in *Shamdasani* v. *King-Emperor*.[5] There was in fact here no order of the court the disobeying of which could constitute a contempt.

There is in Nigeria ample disciplinary power short of this extreme use of power: Legal Practitioners Ordinance, Laws of Nigeria, 1948 Rev., c. 110, ss. 9, 10 and 17, under which a legal practitioner's committee may inquire into any allegation of misconduct made against a legal practitioner, and the court itself, under sections 36 and 37 of that Ordinance, has power to suspend or to strike off the roll for reasonable cause. This was an act which certainly does not come under either branch of Lord Russell's definition.

On the plain words of sections 9 and 10 of the West African Court of Appeal Ordinance, chapter 229 of the 1948 Rev. of the Laws of Nigeria, the West African Court of Appeal obviously had jurisdiction to entertain an appeal whether the alleged contempt was of the nature of criminal or civil contempt. If the Board adopts what Viscount Simon L.C. in *Nokes* v. *Doncaster Amalgamated Collieries Ld.*[6] called the golden rule, namely, "that the words of a statute must prima facie be given their "ordinary meaning," it is quite obvious that these sections 9 and 10 give the right of appeal. The fact that the Court of Criminal Appeal in England is limited to appeals against convictions on indictment is completely irrelevant to my submission of the reading of these two sections. It is submitted that the judgment of the West African Court of Appeal in *Poku and Another*,[7] on which authority the appeal in this case was struck out, was wrong in failing, when dealing with the authorities, to distinguish between cases of contempt which were appealable under the general right of appeal given by section 19 of the Judicature Act, 1873 (of which *Reg.* v. *Barnardo*[8] and *Barnardo* v. *Ford*[9] were examples) and other cases, where under section 47 of the Act of 1873 there was no appeal because the contempt was a contempt of court of a criminal nature (of which *O'Shea* v. *O'Shea and Parnell*[10] was an example). [Reference was also made to *Cox* v. *Hakes*.[11]] In every case it is necessary to consider the answer to three questions: (a) Is this contempt at all? (b) If it is, is it of a civil nature? and (c) Is it of a criminal nature? In this case the answer is that it is not a contempt at all.

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[1] (1886) 35 Ch.D. 449, 455.
[2] [1900] 2 Q.B. 36, 40.
[3] [1936] A.C. 322, 334.
[4] [1951] A.C. 482, 488.
[5] [1945] A.C. 264.

F. R. McQuown followed, and referred to *Scott* v. *Scott*.[12]

D. A. Grant, for the Crown, who had filed a notice under rule 60 of the Judicial Committee Rules, 1925, in which they retained their right to address the Board on the question of costs only. In contempt cases if the Board allows an appeal the normal practice is not to order costs to be paid by the Crown: Bentwich, Privy Council Practice, 3rd ed., p. 220: "Where the "order of a colonial court for contempt of court is reversed, the "Privy Council generally make no order as to costs; in a case, "however, where there had been no contempt of court, the judge "below was ordered to pay the costs of the appeal": *McLeod* v. *St. Aubyn*.[13] That is the only case cited in Bentwich where costs were ordered. There have, of course, been other cases in which costs have been ordered against the Crown, e.g., *Shamdasani*

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[6] [1940] A.C. 1014, 1022.
[7] W.A.C.A., Nov. 16, 1951.
[8] (1889) 23 Q.B.D. 305.
[9] [1892] A.C. 326.
[10] (1890) 15 P.D. 59.
[11] (1890) 15 App.Cas. 506.
[12] [1913] A.C. 417, 454, 486.
[13] [1899] A.C. 549, 562.

v. *King-Emperor*,[14] but the distinction it is sought to draw is that on the facts of that case it was a contempt which took place in the presence of a judge and no action was taken by the judge himself then; the Advocate-General of Bombay, as representing the Crown, later brought the matter before the court. One other case, which is stronger against the Crown, is *Perera* v. *The King* [15]; the distinction between that case and the present one is that Lord Radcliffe, delivering the judgment of the Board, said that Mr. Perera believed that he was acting in good faith in the discharge of his duty. What has been done here is not at all that kind of thing. Though there are exceptions, the general rule still is that there should be no order for costs against the Crown in this class of case. Here the appellant was clearly in the wrong whether or not it was contempt of court. He was in breach of the Supreme Court (Civil Procedure) Rules, c. 211 of the Laws of Nigeria, 1948 Rev., Ord. 16, rr. 8, 9, 11, 19. The point does not appear to have been taken before the judge that this could not in law amount to a contempt of court. This is not a case where, if the judge had been before the Board, costs would have been ordered against him, because the matter was never brought to his notice that he could not in law inflict this penalty and that he might have imposed some other penalty for breach of the Rules.

S. Cope Morgan Q.C. In *Shamdasani's* case [16] Lord Goddard indicated the reason for the general rule: "Where the Crown "appears to uphold a conviction in a criminal case it is not the "practice to award costs to the appellant in the event of the "appeal succeeding." Lord Goddard would appear to mean that that is the rule where, as in certain cases, a criminal element has been attached to contempt of court. And in *Perera's* case [17] that is the precise distinction which the Board was drawing—that the reason for depriving a successful appellant of costs is because his act is in the nature of a criminal matter. That was not so in *Perera's* case.[17] In *Shamdasani's* case [18] the Board cannot have had very much sympathy with the appellant, and on the merits it would seem that the present appellant came nearer to *Perera's* case [19] than to *Shamdasani's*.[20] If there are exceptions, the appellant should be excepted on the grounds used in 1945 and 1951: it would be very unfair to deprive him of costs, and the

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[14] [1945] A.C. 264.

[15] [1951] A.C. 482.

[16] [1945] A.C. 264, 270.

[17] [1951] A.C. 482.

[18] [1945] A.C. 264.

[19] [1951] A.C. 482.

[20] [1945] A.C. 264.

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order that was made in *Perera's* case [21] should be made here—the fine should be repaid and the appellant should have the costs of the appeal.

March 16. The judgment of their Lordships was delivered by LORD TUCKER, who stated the facts set out above and continued: Before proceeding to consider (1) whether the West African Court of Appeal had jurisdiction to entertain the appeal, and (2) whether the conduct complained of was capable in law of amounting to contempt of court, it may be convenient to refer to certain statutory provisions which give disciplinary powers to the courts in Nigeria over barristers and solicitors.

The Legal Practitioners Ordinance (chapter 110 of the Laws of Nigeria, 1948) establishes a Legal Practitioners Committee which can, at the instance of the Attorney-General, inquire into allegations of misconduct against a legal practitioner. This committee reports to the Supreme Court, who may admonish, suspend or strike the name of the offender from the roll of the court. The court can also exercise their powers independently without previous reference to the committee.

Section 56 (1) of the Supreme Court Ordinance (chapter 211 of the Laws of Nigeria, 1948) also gives power to make rules of court for, inter alia, regulating "the discipline, employment in "causes and fees of legal practitioners." In pursuance thereof Order 16 of the Supreme Court Rules gives power to the court in certain circumstances to suspend any barrister or solicitor or to strike his name off the roll.

Rule 11 of Order 16 is as follows: "Every barrister or solicitor "who shall be engaged in any cause shall be bound to conduct the "same on behalf of the plaintiff or defendant, as the case may "be, for whom he shall have been engaged, until final judgment, "unless allowed by the court for any special reason to cease "from acting therein; but he shall not be bound, except under "express agreement, or unless re-engaged, to take any proceedings in relation to any appeal from such judgment."

Rule 19 reads: "Any barrister or solicitor who commits any "breach of any of the said provisions of this Order or fails to "comply with any of the said provisions, for which breach or "non-compliance no specific penalty is provided, shall be liable "for a first offence to a fine not exceeding twenty pounds, and "for any subsequent offence to a fine not exceeding fifty pounds,

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[21] [1951] A.C. 482.

"without prejudice to the powers of the court to suspend any "barrister or solicitor or strike his name off the roll for professional misconduct."

Their Lordships have thought it proper to refer to these provisions to show that the courts in Nigeria possess wide—and no doubt very necessary—disciplinary powers over barristers and solicitors, which it is to be observed, however, do not include the power to imprison.

Turning now to the question of the jurisdiction of the West African Court of Appeal, section 10, c. 229 of the Laws of Nigeria, 1948, which deals with appeals in criminal cases is as follows: "A person convicted by or in the Supreme Court or a "native court may appeal to the Court of Appeal—(*a*) against his "conviction on any ground of appeal which involves a question "of law alone; and (*b*) with the leave of the Court of Appeal, or "upon the certificate of the judge who tried him or, in the case "of a person convicted by a native court, who heard his appeal "to the Supreme Court, that it is a fit case for appeal against "his conviction on any ground of appeal which involves a "question of fact alone, or a question of mixed law and fact, or "on any other ground which appears to the court to be a "sufficient ground of appeal."

Section 9 of the West African Court of Appeal (Gold Coast) Ordinance (c. 5 of the Laws of the Gold Coast), which was the relevant ordinance in *Poku's* case,[1] reads: "A person convicted "by or in a Divisional Court or by any judge may appeal to the "Court of Appeal."

The material word in each case is for present purposes the word "convicted." It is clear that the appellant's conduct was treated by the judge as being contempt of a criminal kind, namely, "any act done . . . calculated to bring a court or a "judge of the court into contempt or to lower his authority," or something "calculated to obstruct or interfere with the due "course of justice or the lawful process of the courts": see *Reg.* v. *Gray*.[2] Was the order made by him, including the order for imprisonment in default of payment of the fine, a "conviction" within the meaning of section 10 of the ordinance? The West African Court of Appeal, following the decision of the full court in *Poku's* case,[1] held that it was not. This decision was based on the view that the ordinance was modelled upon the

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[1] W.A.C.A., Nov. 16, 1951.

[2] [1900] 2 Q.B. 36, 40; 16 T.L.R. 305.

English Criminal Appeal Act, 1907, and was to be interpreted accordingly. The English Act gives a right of appeal only in the case of a person "convicted on indictment."

In the Nigerian Ordinance the words "on indictment" are omitted. It was thought that this omission was due to the fact that indictments do not form part of the criminal process in Nigeria and that the ordinance must therefore be interpreted as limiting the word "convicted" to convictions resulting from process analogous to the English procedure by way of indictment. Reliance was placed on a passage in the speech of Viscount Simon in *Nokes* v. *Doncaster Amalgamated Collieries Ld.*,[3] where, in dealing with ambiguous words, he said: "Where, in construing "general words the meaning of which is not entirely plain there "are adequate reasons for doubting whether the legislature could "have been intending so wide an interpretation as would dis-"regard fundamental principles, then we may be justified in "adopting a narrower construction."

Their Lordships do not consider that there is any ambiguity in the word "convicted." Nor do they accept the view that to interpret it as giving a right of appeal in the case of criminal contempt involves the disregard of any fundamental principle merely because the English Act is so worded as clearly to exclude such a case. They consider that the governing principle to be applied in the present case is that stated by Viscount Simon in *Nokes'* case where he said[4]: "The golden rule is that the words "of a statute must prima facie be given their ordinary meaning."

Dealing with the question whether an appeal lies to the Court of Appeal in England, where appeals in "a criminal cause or "matter" are expressly excluded by the Judicature Act, Lindley L.J. in *O'Shea* v. *O'Shea and Parnell, Ex parte Tuohy*[5] said: "We must not, therefore, be misled by the words 'con-"'tempt' and 'attachment,' but we must look at the substance "of the thing. In the present case I have no doubt that the "proceeding is a summary conviction for a criminal offence, and "therefore no appeal lies."

In the present case an order for payment of a fine and for imprisonment in default has been made by a judge in the Supreme Court for conduct adjudged by him to amount to contempt of court of a criminal nature, and their Lordships feel no doubt that such order was a "conviction" within the meaning of section 10 of the Nigerian Ordinance and that both *Poku's* case [6] and the present case were wrongly decided in the West African Court of Appeal.

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[3] [1940] A.C. 1014, 1022; 56 T.L.R. 988.

[4] [1940] A.C. 1022.

[5] (1890) 15 P.D. 59, 64; 6 T.L.R. 221.

In these circumstances, if their Lordships had been of opinion that the appellant's conduct could amount to contempt it might have been necessary to consider whether the proper course would not have been for the case to be remitted to the West African Court of Appeal to hear and determine the appeal. As, however, their Lordships take the contrary view such a course is not necessary.

It is not possible to particularize the acts which can or cannot constitute contempt in the face of the court, but in this connexion it is desirable to bear in mind what was said in the judgment of the Board delivered by Lord Goddard in *Parashuram Detaram Shamdasani* v. *King-Emperor*,[7] where these words are to be found:—" Their Lordships would once again emphasize " what has often been said before, that this summary power of " punishing for contempt should be used sparingly and only in " serious cases. It is a power which a court must of necessity " possess; its usefulness depends on the wisdom and restraint " with which it is exercised, and to use it to suppress methods of " advocacy which are merely offensive is to use it for a purpose " for which it was never intended."

It is not every act of discourtesy to the court by counsel that amounts to contempt, nor is conduct which involves a breach by counsel of his duty to his client necessarily in this category. In the present case the appellant's conduct was clearly discourteous, it may have been in breach of rule 11 of Ord. 16, and it may, perhaps, have been in dereliction of his duty to his client, but in their Lordships' opinion it cannot properly be placed over the line that divides mere discourtesy from contempt.

Their Lordships will accordingly humbly advise Her Majesty that the appeal be allowed, the order of Manyo-Plange J. set aside, and the fine of £10 repaid to the appellant. The appellant must be paid his costs of the proceedings before the West African Court of Appeal and of his petition for special leave to appeal and one-half of his costs of the appeal.

Solicitors: *Rexworthy, Bonser & Wadkin*; *Burchells.*

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[6] W.A.C.A., Nov. 16, 1951.

[7] [1945] A.C. 264, 270; 61 T.L.R. 448, 449.

[HOUSE OF LORDS.]

H. L. (Sc.)*

1953
Jan. 29;
March 9.

ROAD HAULAGE EXECUTIVE . . . APPELLANTS;

AND

ELRICK . . . . RESPONDENT.

Transport—Nationalization—Road haulage—Compensation—Transport undertaking—One-man business—Compulsory acquisition—Calculation of annual profits—Proprietor's remuneration—Transport Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 49), *s.* 47 (3).

By section 47 (3) of the Transport Act, 1947, in respect of the total or partial cessation of business caused to the proprietor of a transport undertaking by the operation of a notice of acquisition, the British Transport Commission should pay him such sum, if any, as might be just, being a sum calculated by reference to the average net annual profit as defined by Sch. IX to the Act.

The proprietor of a one-man road haulage undertaking, acquired by the Commission, had each year appropriated in his accounts an annual sum as "proprietor's remuneration," in respect of services rendered to the undertaking:—

Held, that in order to determine the profits of the business for each year taken into account in determining the average annual net profit, there should not be deducted from the profit, which would be shown in a profit and loss account made up in the ordinary way, a sum representing the value of the proprietor's services to the business. The fact that he appropriated a sum in his accounts as "proprietor's remuneration" did not affect the amount of the compensation to which he was entitled.

Decision of the First Division of the Court of Session, 1952 S.C. 192, affirmed.

APPEAL from the First Division of the Court of Session.

The respondent, William Elrick, trading as Elrick & Hutcheon, 3–7, Pittodie Lane, Aberdeen, carried on a haulage business at that address until January 22, 1949. At that date there took effect a notice of acquisition of his undertaking served on him in 1948 by the appellants, the Road Haulage Executive, under section 39 of the Transport Act, 1947, and in accordance with the provisions of the Act it was transferred to the British Transport Commission. It was a one-man business carried on by him as proprietor in person, a long-distance haulage undertaking operating between Aberdeen and Glasgow. Formerly it had been carried on as a partnership business. The respondent became sole proprietor on January 11, 1944. At the date of the transfer of his undertaking to the Commission he had 10 long-distance haulage vehicles with depots at Aberdeen and Glasgow.

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* *Present*: LORD NORMAND, LORD OAKSEY, LORD REID, LORD ASQUITH OF BISHOPSTONE and LORD COHEN.

The respondent became entitled to compensation under the Act under several heads and the parties reached agreement on all matters except the proper basis of compensation under section 47 (3). An application with regard to the matter was made to the Transport Arbitration Tribunal, the question submitted being what sum was payable to the respondent by way of compensation for cessation of business under section 47 (3) on the transfer.

The tribunal found: "III . . . (b) The compensation payable "for cessation of business under section 47 (3) is calculated by "reference to the average net annual profit as ascertained in "accordance with the provisions of Schedule IX to the Act. (c) "The said average net annual profit is in this case ascertained "under paragraph 6 of Schedule IX by reference to the last two "financial years of the undertaking, ending March 31, 1947, and "March 31, 1948. (d) During each of these two years the "respondent was the sole partner of the respondent undertaking, "and in each year received £700 by way of proprietor's "remuneration in respect of services rendered to the respondent "undertaking. This payment appeared in the audited accounts "of the undertaking. (e) In computing the average net annual "profit of the undertaking, the applicants did not add back in "each of the said two financial years the said sum of £700 in "respect of proprietor's remuneration. The respondent contended "that in arriving at the average net annual profit the sum "of £700 should be added back. IV. The tribunal propose to "hold that the applicants were wrong in not adding back to the "profits of the undertaking as shown in the balance-sheets the "sum of £700 in each of the years 1946/47 and 1947/48, and that "these sums must be added back to arrive at the average net "annual profit."

The appellants then applied for a stated case for the opinion of the Court of Session under section 106 of the Act. The question of law submitted for the opinion of the court was as follows: "Whether in the circumstances of the case, in ascertaining the "average net annual profit of the undertaking of the respon-"dent under and in terms of the Transport Act, 1947, there "should be deducted the sum paid annually to the respondent "as proprietor's remuneration in calculating, in accordance with "paragraph 2 of Schedule IX to the said Act, the profit made "in carrying on the undertaking in each of the financial years "under review ?" The case was heard by the First Division on February 1, 1952, and the court unanimously answered the question in the negative (subject to a small alteration of the question which is immaterial in this appeal). An appeal to the House of Lords was brought against that decision by the appellants.

H. Milner Holland Q.C. and *Patrick Browne* (both of the English Bar) and *Emslie* (of the Scottish Bar) for the appellants. In ascertaining the average net annual profit of this undertaking the sum of £700 should not be added to or included in its profits for the relevant years, since the value of the respondent's services should be deducted from its income in the profit and loss account. The distinction between his remuneration for services rendered to the undertaking and the profits of the undertaking itself is recognized in the accounts of this business in which in each year £700 in respect of his management remuneration is debited before striking the profits of the business.

Moreover, the underlying basis of the compensation provisions of the Transport Act, 1947, is to give the respondent compensation for what he has lost, and as he remains free to earn salary for his services the compensation under the Act should not include any element based on the value of his services to the undertaking.

The relevant provisions of the Act are in sections 39, 45, 47 and 101 and Sch. IX, in particular the combination of section 47 (3) and paras. 1 and 2 of Sch. IX. In para. 1 it should be noted that the words used are "average net annual profit of the undertaking." In interpreting the Act one is entitled to look at the Transferred Undertakings (Compensation to Employees) Order, 1950 (S.I. No. 1083 of 1950): see Craies on Statute Law, 5th ed., p. 148, and *Ex parte Wier.*[1] This Order, particularly the definition of "emolument" in para. 1 (3), throws light on the intention of the Act. It rightly contemplates that the figures in a profit and loss account may not reflect the truth of the situation.

The tribunal is to find what are the profits of the undertaking and it is not bound by the form of the profit and loss account. If the remuneration shown in it were either too great or too small it could be said that the profits were not those shown. It may be found that the profits of the undertaking are not what they appear to be. If in the running of the business of a company its principal shareholder allowed it to occupy premises without charging it rent, its profits would, on the face of them, be larger than if an economic rent had been charged, and to find the true profits one would have to take into account the fact of this inflation and adjust the figures. The same situation would arise where the owner of a road haulage undertaking such as this allowed premises to be used rent-free for the purposes of the business. Thus the Order contemplates that, in calculating the profits of an undertaking, the true profits must be looked at rather than the owner's drawings—the true profit-earning capacity of the undertaking. In giving effect to that principle, there is an analogy between premises enjoyed rent-free and the services rendered by the owner of a business.

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[1] (1871) L.R. 6 Ch. 875, 879.

The provisions of the Act dealing with compensation for compulsory acquisition constitute a general code based on profits which are the profits of the undertaking as distinct from the individual profits of its proprietor. It is the profit-earning capacity of the undertaking which is relevant and that must be the same whether the owner does the work himself or pays someone else to do it. In the latter case the sum paid would constitute a deduction from the profits, and therefore in the former case a corresponding sum should be deducted. The owner should be treated as notionally receiving a salary. Before the profits of an undertaking are reached allowance must be made for services rendered.

If the contentions on behalf of the respondent were correct, there would be anomalies in the amounts of compensation payable for cessation of business under section 47 (3) of the Act in respect of two businesses of equal value, since these would differ according as the owner himself had rendered services or had employed another person to render the same services, leaving him free to earn by other activities.

There would likewise be anomalies according as the owner carried on the business himself or in partnership or by means of a private limited company. Suppose a haulage contractor with five sons either (1) forms a family company and pays salaries to himself and his sons through it, or (2) employs his sons and pays them salaries without forming a company, taking what is left into his own pocket, or (3) takes his sons into partnership with no salaries. Suppose his own services were worth £1,000 a year and those of each of his sons £500 a year, then, if the profits of the business unreduced by payments for salaries were £5,000, the reduced figure would be £1,500. That is the correct figure. Yet if the decision of the Court of Session were right the basis of compensation in each case would be radically different, although in each case the business was commercially the same because the undertaking was the same. Profits can only be made by the rendering of some services by somebody.

[They referred to *Arthur J. Maggs Ld.* v. *Road Haulage Executive*[2] and *Road Haulage Executive* v. *Yeoman.*[3]]

Leslie Q.C. and Alexander Thomson (both of the Scottish Bar) for the respondent. This Act provides for compulsory acquisition subject to compensation and it is trite law that in the case of a statute which compulsorily deprives a subject of his property rights, albeit with compensation, any doubt or ambiguity of construction should be resolved favourably to the subject.

But the respondent's contention is fully borne out by the plain construction of the Act. Under section 47 (3) there must be paid compensation as defined by Sch. IX. It is important that the subsection specifies that this must be paid " to the transferor." The fallacy underlying the appellants' argument is that it is focused on the undertaking and not on the undertaker. In Scotland a company, a partnership and a joint adventure involve a separate legal persona. It would be a strange anomaly to import into the law in addition the concept of a person being his own manager or servant.

It is only as defined by Sch. IX that profits are to be considered and it provides a perfectly simple concept of profit made in carrying on an undertaking: see para. 2. The Act should be read as it stands favourably to the transferor, without any qualification reducing the profit by the amount withdrawn from the business during the year by him for his personal use. Here the owner of the business is the transferor and there is no straining of the Act to say that the profits are the excess of income over expenditure. The sole question is that of the suggested deduction.

Their Lordships took time for consideration.

March 9. Lord Normand. My Lords, I agree with the opinion which my noble and learned friend, Lord Reid, is about to deliver, and I am satisfied with the reasoning of the Lord President in the court below, and have nothing to add.

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[2] (1950) Road Haulage Cases No. 3 (E. & W.) 15, 16, 29.

[3] (1952) Road Haulage Cases No. 4 (E. & W.) 33, 43; (C.A.) (1952) Road Haulage Cases No. 9 (E. & W.) 75, 82.

Lord Oaksey. My Lords, I also agree with the opinion about to be read by my noble and learned friend, Lord Reid.

Lord Reid. My Lords, the respondent owned a road haulage undertaking in Aberdeen. In 1948 the appellants, the Road Haulage Executive, served on him a notice of acquisition of his undertaking under section 39 of the Transport Act, 1947, and on January 22, 1949, this notice took effect and the undertaking was transferred to the appellants. The respondent thereupon became entitled to compensation under the Act. Compensation was due under several heads, and the parties reached agreement on all matters except the proper basis of compensation under section 47 (3). An application with regard to the matter was made to the Transport Arbitration Tribunal, the question submitted being what sum is payable to the respondent by way of compensation for cessation of business under section 47 (3) on the transfer.

Section 47 (3) provides: " In respect of the total or partial " cessation of business caused to the transferor by the operation " of a notice of acquisition, the Commission shall pay to the " transferor such sum, if any, as may be just, being a sum calculated by reference to the average net annual profit as defined " in Schedule IX to this Act, and being not less than twice nor " more than five times the said average net annual profit.

" In considering the proportion which the amount of the " compensation is to bear to the average net annual profit as " so defined, regard shall be had to the likelihood or otherwise " that profits at the rate represented by the average net annual " profit might, but for the operation of this Act, have been made " after the date of transfer by carrying on the undertaking." Accordingly the amount of compensation depends on two factors, the average net annual profit and a " multiplier " which is to be not less than two or more than five. There is no dispute in this case about the multiplier: the sole question is what is the average net annual profit.

[His Lordship recited the findings of the tribunal, the question of law submitted in the case stated and the decision of the First Division, and continued:] The respondent's business was a one-man business which he conducted himself and of which he was the sole owner. The appellants contend that, in order to determine the profits of the business for each year taken into account in determining the average net annual profit, there ought to be deducted from the profit which would be shown in a profit and loss account made up in the ordinary way a sum representing the value of the respondent's services to the business. Whether or not that is right depends on the meaning of the phrase "average "net annual profit." Section 47 (3) refers to "the average net "annual profit as defined in Schedule IX to this Act," so one must go to that Schedule.

The Schedule does not contain a definition. It provides in para. 1 that "the average net annual profit of the undertaking" shall be ascertained in accordance with the subsequent provisions of the Schedule; and in para. 2 that "there shall be ascertained ". . . what profit or loss was made in the carrying on of the "undertaking." There is no further definition, later paragraphs being concerned with various special matters. One would, therefore, naturally assume that, apart from these special matters, the word profit must be taken to have its ordinary meaning.

In the ordinary way everything that an owner gains in running his business is profit, and there is no question of dividing up his gains before the amount of profit is ascertained and calling a part remuneration for his services and the rest profit. The owner does not pay wages or salary to himself and deduct that as an expense of running the business. It is true that sometimes the owner may draw so much a week for himself and, for convenience, enter that separately in his accounts. The respondent did that in this case: he entered £700 per annum in his accounts as proprietor's remuneration, but that was a mere bookkeeping entry without legal or practical significance. He chose to apportion his profit in this way, but what he did with his profit after he had earned it cannot affect the amount of the compensation to which he is entitled. The appellants' case would have been the same if he had never made any such appropriation.

The appellants do not dispute that for ordinary purposes there is no distinction between one part of the profit and another, but it is contended that, when the provisions of the Act dealing with compensation are read as a whole, it becomes apparent that what the Act means by profit is the profit-earning capacity of the undertaking and not the profit actually earned by the owner. It is said that the profit-earning capacity of the undertaking must be the same whether the owner does the work himself or pays someone else to do it: in the latter case the sum so paid would be a deduction and, therefore, when the owner does the work himself a similar deduction must be made.

I cannot find anything in the Act to support this distinction between profit-earning capacity and actual profit made by the

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owner. If the Act had intended compensation to be based on an estimate of profit-earning capacity it would have been easy to say so; but in fact Sch. IX deals with profit actually earned in the past and compensation is based on that. The appellants found on the phrase "average net annual profit of the under-"taking" in para. 1 of the Schedule. But in para. 2 the reference is to "what profit or loss was made in the carrying "on of the undertaking," and this must mean what was made by the owner, and an owner who works himself naturally makes more profit than an owner who pays someone else to work for him. I see nothing to indicate that the word "profit" in para. 1 means something different from what it means in para. 2. And I think that this gains support from the terms of section 47 (3) which sets out what it is for which compensation is to be paid. It is not the profit-earning capacity of the undertaking but the "cessation of business caused to the transferor" (i.e., the owner), and the cessation of business caused to an owner whose business is to conduct his own undertaking is a different thing from the cessation of business caused to an owner who does no work but merely draws profit.

The appellants found strongly on the contrast, if the respondent is right, between the compensation payable under section 47 (3) in respect of two exactly similar businesses if in the one case the owner had continued to own it himself, but in the other he had formed a private company and taken a salary as managing director. In the latter case that salary would be deducted as an expense and the profit of the company would be reduced accordingly. It was said that the real value of the business would not have been altered by the formation of a company, and that Parliament must have intended that the compensation should be the same in each case, and therefore must have intended that in the former case there should be a deduction of the value of the owner's services to the business to correspond with the deduction of the salary in the latter case. To that there appear to me to be two answers. In the first place, the intention of Parliament must be discovered from the terms of the Act, and, as I have said, I can find nothing in the Act to indicate any intention that such a deduction should be made. And, secondly, even if the appellants were right there would still be no equality between the two cases.

Section 101 of the Act provides for compensation to officers or servants of the transferor who suffer loss of employment or diminution of emoluments by reason of the transfer, but there

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is no such compensation if the transferor himself is out of work by reason of the transfer. So the owner who had formed a company and became its managing director could claim compensation under section 101 but the owner who had continued to own his own business could not. If Parliament had intended that part of the latter owner's profit should be treated as his remuneration it would seem strange that he should be excluded from claiming compensation for loss of that remuneration on the transfer. I think that the limited scope of section 101 goes to confirm my view that the Act does not require the owner to treat part of his profit as remuneration. Further, if the Act did require that, I would expect to find in it some statement or definition of what is to be deducted: this might be the value of the owner's services to his business or it might be the salary which the owner could command in the market, and these might differ widely.

Then the appellants founded on the terms of the Transferred Undertakings (Compensation to Employees) Regulations (S.I. 1950 No. 1083) as throwing light on the intention of the Act. I find it difficult to see how regulations made by a Minister can be used to determine the intention of Parliament expressed in an Act even where, as in this case, the regulations have been the subject of an affirmative resolution of both Houses. But I do not find it necessary to decide that question because I find that the part of the regulations on which the appellants specially rely is so obscure that I could get no help from it.

Finally, the appellants say that a profit and loss account based on the sums actually paid and received in carrying on the business is not conclusive, and that, if these sums do not represent the true value of goods or services in respect of which they were paid, then the true value must be taken instead. From this they argue that the true value of the owner's services must also go into the account. It was held by the Transport Arbitration Tribunal in *Arthur J. Maggs Ld.* v. *Road Haulage Executive* [1] that where the owner of the undertaking transferred had allowed it to occupy rent-free premises which belonged to him, the true rental value of the premises ought to go into the account. I see no reason to doubt this decision. If some figure is not settled by any agreement between independent parties but is a mere bookkeeping entry it may well be necessary to substitute the true value to find the true profit. But I agree with the view of the tribunal in *Road Haulage Executive* v. *Yeoman* [2] that that "is a "very different matter from charging the profits with a notional "remuneration to the proprietors." The decision of the Tribunal in *Yeoman's* case was reversed by the Court of Appeal,[3] but on grounds which had nothing to do with the issue in this case, and Evershed M.R., in delivering the judgment of the court, refrained from expressing any opinion on the questions now in issue.

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[1] Road Haulage Cases No. 3 (E. & W.) 15.

In my judgment this appeal should be dismissed with costs to the respondent.

LORD ASQUITH OF BISHOPSTONE. My Lords, I also agree with the opinion delivered by my noble and learned friend, Lord Reid. The contrary view seems to me to be based on the fallacy that a one-man firm is a separate person from the one man who owns and conducts it, and that it can employ him. I respectfully concur in the whole of Lord Reid's reasoning.

LORD COHEN. My Lords, I agree with the opinion delivered by my noble and learned friend, Lord Reid, and with the whole of his reasoning as well as with that expressed by Mr. Montgomery White in giving the decision of the Transport Arbitration Tribunal in *Yeoman's* case [4] to which Lord Reid refers. I have nothing further to add.

Appeal dismissed.

Solicitors: *Clifford-Turner & Co., for J. & A. Hastie, S.S.C., Edinburgh; Forsyte, Kerman & Phillips, for James Farquharson, S.S.C., Edinburgh, and Henry J. Gray & Connachie, Advocates, Aberdeen.*

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[2] Road Haulage Cases No. 4 (E. & W.) 33, 44.

[3] Road Haulage Cases No. 9 (E. & W.) 75.

[4] Road Haulage Cases No. 4 (E. & W.) 33, 44.

[HOUSE OF LORDS.]

D'AVIGDOR-GOLDSMID . . . . APPELLANT;

AND

INLAND REVENUE COMMISSIONERS . RESPONDENTS.

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1952
Dec. 10, 11, 15, 16, 17, 18.

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Feb. 5.

Revenue—Estate duty—Property passing on death—Policy of life assurance—Claim for estate duty on value of policy—Whether an interest provided by deceased—Whether any beneficial interest arose on death of deceased—" Donee "—Meaning—Finance Act, 1894 (57 *& 58 Vict. c.* 30), *s.* 2 (1) (*d*).

By a marriage settlement made in 1907, a settlor settled a policy on his life, effected in 1904, for £30,000 with profits. Subsequently a resettlement of the policy was made and on November 10, 1934, the settlor and his eldest son, under a joint power of appointment conferred by the resettlement, appointed the policy and other settled property, being freehold premises, to the son absolutely. From the date of that appointment the premiums previously paid by the settlor were paid by the son but, to the extent of the income from the freehold, premiums so paid were by the Finance Act, 1939, s. 30, attributed to the settlor. The settlor died in 1940 and his son received under the policy £48,765. Estate duty was claimed under section 2 (1) (*d*) of the Finance Act, 1894:—

Held, that estate duty was not payable, since from 1934 "the "beneficial interest" in the policy belonged to the son and no "beneficial interest" in it accrued or arose on the death of the deceased, within the meaning of section 2 (1) (*d*) of the Act.

Reasoning of Palles C.B. in *Attorney-General* v. *Robinson* [1901] 2 Ir.R. 67 disapproved.

Decision of the Court of Appeal (sub nom. *In re D'Avigdor-Goldsmid. D'Avigdor-Goldsmid* v. *Inland Revenue Commissioners*) [1951] Ch. 1038 reversed.

APPEAL from the Court of Appeal (Evershed M.R., Jenkins and Birkett L.JJ.).

This was an appeal from an order of the Court of Appeal made on July 16, 1951, discharging an order of Vaisey J. made on December 20, 1950, and declaring that on the true construction of the Finance Act, 1894, and the Acts amending the same and in the events which had happened estate duty became payable on the death on April 14, 1940, of the late Sir Osmond Elim D'Avigdor-Goldsmid, Bt., in respect of the whole value of the policy of assurance, taken out by him on May 3, 1904, under annual premiums of £695, by virtue of section 2 (1) (*d*) of the Act of 1894 as extended by section 30 (1) of the Finance Act, 1939, subject to the reduction provided for by that subsection. He paid the premiums so long as he had any interest in the policy, viz., until November 10, 1934. The order appealed from was made in proceedings instituted by the appellant, Sir Henry Joseph D'Avigdor-Goldsmid, Bt., who from November 10, 1934, had been absolutely entitled to the policy and had paid the premiums out of his own moneys, by originating summons under the Administration of Justice (Miscellaneous Provisions) Act, 1933, for the determination of the question whether the estate duty mentioned in the order was payable as claimed by the respondents, the Commissioners of Inland Revenue.

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* *Present*: VISCOUNT SIMON, LORD PORTER, LORD MORTON OF HENRYTON, LORD REID, and LORD ASQUITH OF BISHOPSTONE.

The facts, stated by Lord Morton of Henryton, were as follows: Immediately before October 22, 1907, Sir Osmond Elim D'Avigdor-Goldsmid (hereafter referred to as "Sir Osmond") was the owner of a policy of assurance on his own life for the sum of £30,000 with profits. He had already paid the first four annual premiums.

Sir Osmond was married once only, on October 23, 1907. The appellant was the eldest son of the marriage, and was born on June 10, 1909.

Upon and in consideration of his marriage Sir Osmond made a settlement dated October 22, 1907. By the settlement Sir Osmond settled certain freehold estates, certain investments, and the said policy of assurance upon certain trusts, and covenanted to pay the premiums on the policy. This covenant was repeated in the resettlement hereafter mentioned.

By virtue of (*a*) The Goldsmid Estate Act, 1928, (*b*) an appointment by Sir Osmond dated June 10, 1930, (*c*) a disentailing deed of the same date, (*d*) a resettlement of the same date, the policy and a freehold property, No. 27 Wood Street, in the City of London, came to be held by trustees upon such trusts and in such manner generally as Sir Osmond and the appellant should from time to time by any deed or deeds revocable or irrevocable jointly appoint, and in default of and until and subject to any such appointment upon the trusts mentioned in the resettlement.

By a deed of appointment dated November 10, 1934, under the hands and seals of Sir Osmond and the appellant, in exercise of the joint powers of appointment conferred by the resettlement they appointed that (i) the policy and (ii) the said premises, No.

27 Wood Street, should thenceforth be held by the trustees and Sir Osmond respectively in trust for the appellant absolutely and in fee simple for his own use and benefit discharged from all the trusts, powers and provisions declared by the resettlement. The trustees, by the direction of the appellant, and the appellant, thereby released and discharged Sir Osmond from all his covenants in the resettlement contained for the payment of premiums upon and otherwise relating to the policy and it was provided that a term of 99 years limited by the resettlement should as regards the premises affected by that appointment cease and be extinguished.

The effect of this appointment was that upwards of five years prior to the death of Sir Osmond the appellant became the absolute beneficial owner of the policy and of No. 27 Wood Street, to the entire exclusion of Sir Osmond. The legal estate in No. 27 Wood Street was vested in the appellant soon after the said appointment and the policy was assigned to him. As from the date of the appointment the appellant could at any time have surrendered or sold the policy had he so desired, but he preferred to keep it up, which he did until it matured.

Sir Osmond died on April 14, 1940, and thereupon the policy moneys became payable and the appellant received the sum of £48,765 thereunder.

Sir Osmond, pursuant to his covenant in the settlement, paid 23 premiums in addition to the four paid by him before the settlement was executed. After the resettlement and before the appointment he paid a further four premiums pursuant to his covenant in the resettlement. Six premiums became payable after the policy appointment, and all of these were paid by the appellant.

At the date of the appointment No. 27 Wood Street was let under a lease dated July 25, 1934, for a term of 21 years from March 25, 1934, at a yearly rent of £700. This property was destroyed by enemy action in 1940 and the lease was disclaimed on December 25, 1940. The total rent received by the appellant from this property between the date of the appointment and the said disclaimer was £3,083 15s. 3d., of which £464 0s. 3d. was received after the death of Sir Osmond.

The respondents put forward a claim to estate duty on the policy moneys. This claim was based originally on section 2 (1) (*d*) of the Finance Act, 1894, as extended by section 30 (1) of the Finance Act, 1939. In the later correspondence, however, the claim was based primarily on section 2 (1) (*c*) of the said Act and limited to duty on 27/33rd parts of the money received, but the claim under section 2 (1) (*d*) was maintained as an alternative claim.

In consequence of these claims to duty the appellant as plaintiff on September 3, 1949, issued an originating summons in the Chancery Division, making the respondents the defendants. The summons raised the question whether on the death of Sir Osmond estate duty became payable as claimed by the respondents on the policy or the said sum which became payable thereunder (a) under section 2 (1) (*c*), or (b) under section 2 (1) (*d*) aforesaid, and if under (a) on what proportion of the policy moneys or whether (as claimed by the appellant) no duty became payable.

Vaisey J. held that no estate duty became payable upon the death of Sir Osmond in respect of the policy, or on the value of it or any part of such value, or on the said sum of £48,765.

On an appeal by the present respondents the Court of Appeal (The Master of the Rolls, Jenkins and Birkett L.JJ.) declared that estate duty became payable upon the death of Sir Osmond in respect of the whole value of the policy, by virtue of section 2 (1) (*d*) of the Finance Act, 1894, as extended by section 30 (1) of the Finance Act, 1939, subject to the reduction provided for by the last-mentioned subsection, and it was ordered that the parties were to be at liberty to apply in chambers for an inquiry as to the amount of such duty.

The Court of Appeal affirmed the decision of Vaisey J. with regard to the claim for duty under section 2 (1) (*c*) on the ground that the appellant was not a " donee," since he derived his title under the marriage settlement and was within the marriage consideration. The appellant was given liberty to appeal and the respondents were given liberty to enter a cross-appeal. There was, however, no cross-appeal.

Tucker Q.C., *S. Pascoe Hayward Q.C.* and *Wilfrid Hunt* for the appellant. No beneficial interest arose by reason of the death of the deceased. It had been there since 1934. The debt due by the insurance company was the property of, and the beneficial interest in it resided in, the appellant five years before his father's death, although the company was not bound to pay the money until the death. Lump sum policies do not come within section 2 (1) (*d*) of the Act at all. They are quite different

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from annuities. They are not an "other interest" within that paragraph. But the House can give effect to the appellant's argument without touching that question.

Sections 1 and 2 of the Act are mutually exclusive. Section 1 deals with property which actually passes on death. Section 2 deals with property which does not pass on death but is deemed to do so for the purposes of the Act: see *Cowley* v. *Inland Revenue Commissioners* [1]; *Attorney-General* v. *Milne* [2]; *Attorney-General* v. *Lloyds Bank Ld.*[3] See also Finance Act, 1894, ss. 7, 15 (1), 22 (1) (*f*); Finance Act, 1939, s. 30; Customs and Inland Revenue Act, 1889, s. 11, and *Lord Advocate* v. *Fleming.*[4]

As to the exact nature of an insurance policy regarded as property, a single premium policy is just a plain ordinary contract that in return for one payment the insurance company undertakes to pay a sum of money on death or a smaller sum on demand on surrender of the policy. The full sum can only be paid to executors and administrators or assigns. The moment the single premium is paid the assured is absolute master of a debt, and he can assign, during his life, the sum due under the policy. In the case of other policies, as soon as one year's premium is paid the position is exactly the same during that year; it is a fully paid policy. In the case of an endowment policy the full sum is payable on the happening of either of two events, whichever first occurs, viz., death or the attainment of a specified age. The only uncertainty is as to the date of death. The case is not different from that of a bill of exchange or promissory note made payable to the payee on the death of the drawer.

Under section 2 (1) (*d*) liability can only be established if two separate conditions are fulfilled: (1) that the deceased has purchased or provided the other interest, and (2) that a beneficial interest in that other interest must accrue or arise by survivorship or otherwise for the first time on the death of the deceased. If such a beneficial interest in that other interest does not accrue or arise for the first time on the death of the deceased there can be no liability under section 2 (1) (*d*): see *Adamson* v. *Attorney-General.*[5]

All that can be taxed under section 2 (1) (*d*) is the beneficial interest in that which was provided, an interest which comes into

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[1] [1899] A.C. 198, 212.
[2] [1914] A.C. 765, 769, 777, 779.
[3] [1935] A.C. 382, 393.
[4] [1897] A.C. 145, 154.
[5] [1933] A.C. 257.

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existence on the death of the settlor by survivorship or otherwise. But here the interest was the same both before and after the death—an absolute beneficial interest: see *Attorney-General* v. *Lloyds Bank Ld.*,[6] the opinion of Lord Tomlin.

Looking at section 2 (1) (*d*), what is the property which is deemed to pass? The annuity or other interest—but only so much as represents the beneficial interest in it which accrues or arises on death. One does not look at the money actually paid by the insurance company but at the debt—the right under the policy. The case of an annuity is different because a person in order to become entitled to it must survive whereas in the case of a lump sum to which he is absolutely entitled he need not survive, since if he dies it goes to his estate. Thus, in such a case as the present, where a lump sum is in question, no beneficial interest accrues or arises on the death of the deceased. The beneficial interest can be co-extensive with the annuity but where there is a lump sum payable under the policy which is settled, as in *Attorney-General* v. *Dobree*,[7] what is taxed is not the policy moneys but, in that case, the value of the wife's life interest under the settlement. When, as in the present case, there is no contingency, there is no passing on the death and no beneficial interest arises on the death which was not there before. A right to be paid a sum of money at a future date does not change when the date of payment arrives. What is to be taxed is the extent of the beneficial interest on its market value. To come within section 2 (1) (*d*) the property must be settled property in some form or another. This is the first case in which the beneficiary was absolutely entitled under a policy both before and after the death.

The relevant authorities are *Attorney-General* v. *Robinson*[8]; *Richardson* v. *Inland Revenue Commissioners*[9]; *Attorney-General* v. *Hawkins*[10]; *Attorney-General* v. *Murray*[11]; *Attorney-General* v. *Lethbridge*[12]; *Lethbridge* v. *Attorney-General*[13]; *Inland Revenue* v. *Scott's Trustees*[14]; *Attorney-General* v. *Pearson*[15]; *Tennant's Trustees* v. *Lord Advocate*[16]; *Tennant* v. *Lord Advocate*[17]; *In re Hodson's Settlement*[18]; *Westminster Bank*

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[6] [1935] A.C. 382.
[7] [1900] 1 Q.B. 442.
[8] [1901] 2 Ir.R. 67, 87, 89–90.
[9] [1909] 2 Ir.R. 597, 624.
[10] [1901] 1 K.B. 285.
[11] [1904] 1 K.B. 165.
[12] [1905] 2 K.B. 323.
[13] [1907] A.C. 19.
[14] 1918 S.C. 720.
[15] [1924] 2 K.B. 375.
[16] 1938 S.C. 224.
[17] [1939] A.C. 207.
[18] [1938] Ch. 916; (C.A.) [1939] Ch. 343.

Ld. v. *Attorney-General*[19]; *Lord Advocate* v. *Hamilton's Trustees*[20]; *Lord Advocate* v. *Inzievar Estates.*[21]

Attorney-General v. *Hawkins*,[22] *Lord Advocate* v. *Hamilton's Trustees*[23] and *Tennant* v. *Lord Advocate*[24] are relied on. *Attorney-General* v. *Dobree*[25] was wrongly decided. *Attorney-General* v. *Robinson*[26] and *Richardson* v. *Inland Revenue Commissioners*[27] rested on incorrect reasoning and should not be followed. *Attorney-General* v. *Murray*[28] does not affect the appellant's case.

Here there was a chose in action which belonged absolutely to the appellant from 1934. Nothing could take it from him. So on the death no further interest or benefit arose or accrued. The beneficial interest in the policy is not the right to immediate payment but the right to call for payment at the due date.

Section 2 (1) (*c*) of the Act expressly deals with estate duty on policies of life assurance and in some circumstances imposes duty on part only of a policy. This shows that section 2 (1) (*d*) was not intended to relate, and does not relate, to such policies of assurance which are vested in an assignee absolutely. Previous judgments which either hold or accept that it applies to policies of assurance were wrongly decided.

When a policy of life assurance is vested in or provided for a person, what is immediately so vested or provided is the right under the contract contained in the policy to be paid the moneys, and not the actual moneys themselves which will become payable in the future by virtue of the policy. In any case, where the right to payments under such a policy has become vested in a person absolutely, then as from the date of that vesting he has the whole beneficial interest in the policy in possession and there is no interest in expectancy and no beneficial interest accrues or arises by survivorship or otherwise on the death of the person on whose life the policy of assurance was taken out. In the present case the death of the deceased created no change in the title to the policy or the money payable thereunder and the appellant as owner could at any time have sold or surrendered the policy and all his rights thereunder. The judgment of the Court of Appeal is wholly based on the view that "the beneficial interest "arising or accruing . . . on the death" is in every case the

[19] [1939] Ch. 610.
[20] 1942 S.C. 426.
[21] [1938] A.C. 402, 412.
[22] [1901] 1 K.B. 285.
[23] 1942 S.C. 426.
[24] [1939] A.C. 207, 213.
[25] [1900] 1 Q.B. 442.
[26] [1901] 2 Ir.R. 67.
[27] [1909] 2 Ir.R. 597.
[28] [1904] 1 K.B. 165.

beneficial interest in the money paid by virtue of the policy. This is clearly wrong.

The appellant immediately before the death of the deceased had a beneficial interest in possession in the policy and not an interest in expectancy, and if (contrary to the contention of the appellant) section 2 (1) (*d*) is held to apply to the interest in the policy, the beneficial interest accruing or arising on the death of the deceased can only be any increase in value of the interest of the appellant which resulted from the death, the Finance Act, 1934, s. 28, having no application to this case.

The practical effect of the judgment of the Court of Appeal is that notwithstanding the limit imposed by section 2 (1) (*c*) on the proportion subject to duty, yet the whole or practically the whole of the proceeds of the policy must be subjected to duty under section 2 (1) (*d*), a result which cannot have been intended by the legislature.

Lord Advocate v. *Hamilton's Trustees*,[29] particularly Lord Wark's judgment, is correct and is to be preferred to any decisions to the contrary in certain English cases.

S. Pascoe Hayward Q.C., following. Assuming that a policy of assurance can come within the words "an annuity or other "interest" in section 2 (1) (*d*), the draftsman had in mind the type of case exemplified in *Adamson* v. *Attorney-General*,[30] where there is a settlement or trust instrument under which the benefit can arise. The phrase "the beneficial interest" is one commonly used to describe the interest of a beneficiary under a trust instrument. In the Finance Act, 1934, s. 28, Parliament was directing its attention exclusively to the *Adamson* [30] type of case: see the words "any interest in expectancy the beneficiary "may have had therein." This is the first time in the reported cases that it has been sought to exact tax under section 2 (1) (*d*) when there was no trust instrument, in force at the death, under which the beneficial interest arose. Here there has been no change in the nature of the beneficial interest. Before the death the interest was indefeasible and it remained indefeasible after the death. Under the decision of the Court of Appeal policies of assurance would come within section 2 (1) (*d*), but owing to their intrinsic nature the limitations of the section would not be applicable. If the court was right the charge would arise in cases where the assured had sold the policy for full consideration, money or money's worth, during his lifetime.

[29] 1942 S.C. 426.

[30] [1933] A.C. 257.

Sir Lionel Heald A.-G., *Sir Reginald Manningham-Buller S.-G.* and *J. H. Stamp* for the Crown. The appellant's argument is unsound. This branch of the law is not an exact science. In the case of tax law, legislation and the courts are not working hand in hand, " broadening down from precedent to precedent." The legislation often works in a series of jerks, declaring that what the court has held to be law shall not be law. This makes it difficult to reconcile the authorities.

It is submitted: (A) (i) An " other interest " within the meaning of section 2 (1) (*d*) was " purchased or provided by the " deceased " in the shape of a lump sum of £48,765 payable in accordance with the provisions of the policy. (ii) A beneficial interest arose in the whole of the lump sum on the death. (iii) That lump sum must therefore be deemed to have passed on the death of the deceased and thus created a liability to duty on the death, subject to section 30 of the Finance Act, 1939.

Alternatively, (B) if it be held that the " other interest " is constituted by the policy and not by the lump sum payable under it, a new beneficial interest arose or accrued on the death in the shape of an absolute right to sue for and receive the lump sum in place of the contingent future right.

Alternatively, (C) if the " other interest " was the policy and not the money payable and paid under its terms upon the death, and no new beneficial interest then arose or accrued, in that case, on the principles laid down by the House of Lords in *Adamson* v. *Attorney-General*[30] and on the arguments presented on behalf of the appellant, there was an increase in the value of the interest and that interest, however small, fell to be taxed, even in the state of the law existing when *Adamson's* case[30] was decided. That sum would, no doubt, have been small at that time, but today that fact is immaterial in view of the provisions of section 28 of the Finance Act, 1934, the result of which is that the whole value of the dutiable property is subject to tax, the previous value having been an " interest in expectancy " which must be ignored.

In the case of (A) there is a lump sum in which there never was a beneficial interest before the death. In the case of (B) there was a beneficial interest in the policy before the death but a new and distinct beneficial interest arose after the death. In the case of (C) there is a change in the beneficial interest, which produces the same result.

[30] [1933] A.C. 257.

The Probate Duty Act, 1860, which imposed duty on "all "the personal or movable estate and effects . . . disposed of "by will" started a race between the Revenue and the taxpayer. The Act left a gap which section 38 of the Customs and Inland Revenue Act, 1881, was designed to close. This section was amended by section 11 of the Customs and Inland Revenue Act, 1889.

There is nothing startling in the idea of duty being payable on a policy of assurance or of such policies not profiting by the time limit. The Finance Act, 1894, was a notable advance in the process of taxing inheritance and introduced a new principle of taxing property which passes on death. Section 2 was intended to fill in gaps in previous legislation. Subsection (2) (*d*) is clearly a sweeping-up clause, and therefore any suggestion that because a policy of assurance is in certain circumstances covered by paragraph (*c*) it is excluded from paragraph (*d*) is unsound. There may be some overlapping. On the argument for the appellant, annuities would be as much out of the picture as the policy moneys, yet if the policy had been not for a lump sum but for an annuity section 2 (1) (*d*) would clearly have applied. This appears from section 15 of the Act. For the purposes of section 2 (1) (*d*) there is no difference between a contract for payment of a single sum and one for payment of an annuity. See also section 16 of the Finance Act, 1896. As to the payment of premiums, see *Barclays Bank Ld.* v. *Attorney-General.*[31]

As to the propositions already set out:—

(A) In the case of section 2 (1) (*d*) it is assumed for the purposes of the argument that assurance policies come within it. They are not mentioned specifically but are one of a number of different things covered by its terms. Similar results can be obtained by several methods, and a policy of assurance is a method by which money becomes available at a man's death.

(A) (i) The words "purchased or provided" are satisfied in the circumstances of this case, and the lump sum payable constitutes an "other interest." This construction fits in with the conception of a "beneficial interest." Section 2 (1) (*d*) is dealing with property which is deemed to pass at the death, and its terms are apt to refer to the policy moneys.

(A) (ii) The policy was liable to be defeated at any time up to the death by failure to observe the conditions or pay the premiums. No right to recover the moneys could be said to exist before the death. For example, no action could be started to recover them. Till the death there was no existing legal obligation on the insurance company. The "interest purchased "or provided by the deceased" is the amount of the policy moneys: see *Westminster Bank Ld.* v. *Attorney-General.*[32] In the case of an annuity what the deceased has provided is the annuity, and what is sauce for the annuity must be sauce for the assurance policy too: see also section 15 of the Act.

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[31] [1944] A.C. 372, 379.

(A) (iii) This proposition follows from what has been already said. The notional passing did not take place by reason only of the purchase from the insurance company; it took place by reason of the purchase coupled with the provision of the policy by the deceased for the benefit of the appellant. Proposition (A) is justified on its merits as the logical application of the section apart from authority.

(B) There may be said to have been a chose in action created by the appointment in 1934, but till the death the insurance company was no more obliged to pay the money than the appellant was bound to pay the premiums. If there is only the date of payment in doubt the situation is different from the case where the claim is liable to be defeated by non-observance of the conditions of a policy of assurance. Here it is necessary to define one's terms more closely than by using the term chose in action. One does not make a complicated argument more simple by conducting it in French. The right here was one thing before the death and another thing after it, one piece of property before and another piece of property after. A life policy is an inchoate chose in action: see Hanson on Death Duties, 9th ed., p. 94. After the death there is an immediate right of action, whereas before the death there was none.

The respondents rely on *Attorney-General* v. *Robinson*[33]; *Attorney-General* v. *Dobree*[34]; *Attorney-General* v. *Murray.*[35] See also *Attorney-General* v. *Quixley*[36] and Green on Death Duties, 3rd ed., p. 20.

Suppose A purchased or provided an annuity, under a policy with an insurance company, to arise on his death, payable to B or his personal representatives, that clearly would come within section 2 (1) (*d*). The only difference between that case and the present case is that here a lump sum is payable. But if it applies to an annuity it must apply to a lump sum too: see Green on Death Duties, 3rd ed., p. 832. A new and distinct interest arose at the death.

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[32] [1939] Ch. 610, 618.
[33] [1901] 2 Ir.R. 67.
[34] [1900] 1 Q.B. 442.
[35] [1904] 1 K.B. 165.
[36] (1929) 98 L.J.K.B. 652, 655.

(C) If it be held that the nature of the beneficial interest is not changed, the appellants are faced with the difficulty raised by *Adamson* v. *Attorney-General.*[37] The policy becomes more valuable on the death because the contingent right becomes an enforceable right. The increase in value is not irrelevant. To say that in spite of it the appellant always had the same beneficial interest in the property is a metaphysical conception. Lord Russell of Killowen's dissenting opinion in *Adamson's* case [37] is the appellant's argument in the present case: see also *Attorney-General* v. *Lloyds Bank Ld.*[38] What Lord Loreburn L.C. said in *Lethbridge* v. *Attorney-General* [39] applies here. Certain assets are subtracted from the estate of the deceased and reappear after his death in the shape of a beneficial interest of someone else.

The interest aimed at is in the policy moneys when received and not in the insurance contract, so that on the death there springs up an interest which then and there accrues. It is in those moneys that there was an interest provided by the deceased within section 2 (1) (*d*) of the Act of 1894, as extended by section 30 of the Finance Act, 1939. The immediate right to receive them came into existence for the first time on the death of the deceased and was an interest which accrued or arose within the meaning of those Acts.

Sir Reginald Manningham-Buller S.-G. following. In the general scheme of the Finance Act, 1894, sections 1 and 2 define the subject-matter on which the duty is to be levied. The test is property passing on the death or deemed to pass on the death. Section 2 was necessary both to remove doubts as to what should be treated as part of the estate and also to prevent tax avoidance: see Green on Death Duties, 3rd ed., pp. 48–9, citing *Attorney-General* v. *Quixley.*[40] Section 2 (1) (*d*) is meant to be of general application, bringing in every type of annuity purchased by the deceased. An annuity under a settlement would not be differently treated from any other. A person entitled to an annuity has a beneficial interest in that annuity. The same principles apply to a lump sum under a policy of assurance assigned in the deceased's lifetime as to an annuity. Where there is a gift of something in futuro which is only going to be realized at a future date the taxpayer cannot take advantage of the five years' period between gift and death. The right of the assignee before death is no more than the right to payment on the happening of that event. It is not the same right after death as before it. The right has changed.

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[37] [1933] A.C. 257.

[38] [1935] A.C. 382, 397.

[39] [1907] A.C. 19, 23.

[40] 98 L.J.K.B. 652, 655.

In *Adamson* v. *Attorney-General* [41] the beneficial interest existed throughout; the change was that it became indefeasible. The House of Lords held that the change of value resulting from that change was taxable.

In *Attorney-General* v. *Murray* [42] the unsuccessful argument was very like the appellant's in the present case. The reasoning of the court there was correct and *Attorney-General* v. *Robinson* [43] was rightly approved.

The word "accruing" is important. "Accrue" is defined in the Oxford English Dictionary as: "To come by way of addition "or increase, or as an accession or advantage. . . . To arise or "spring as a natural growth or result."

[He also referred to the Customs and Inland Revenue Act, 1881, s. 38 (2) (*b*), and to *In re Miller's Agreement*.[44]]

Tucker Q.C. in reply. Even though the policy moneys could come within the words "other interest," that does not affect the point relating to the beneficial interest accruing or arising. What is taxed is the beneficial interest in that which is provided. If there is no change in the beneficial interest before and after the death there is nothing to tax.

Attorney-General v. *Dobree* [45] should be overruled. The decision in *Attorney-General* v. *Robinson* [46] may be justified but not on the ground given. *Attorney-General* v. *Hawkins* [47] is right and does not affect this case. *Inland Revenue* v. *Scott's Trustees* [48] was wrongly decided because the whole of the policy moneys was taxed, and not merely the value of the daughters' life interest and because the daughters had a vested life interest in possession before the death. *Attorney-General* v. *Pearson* [49] is not submitted to be wrongly decided as the point in the present case was not argued there. In *Attorney-General* v. *Murray* [50] there was no decision on the present point. *Adamson* v. *Attorney-General* [51] has no effect on this case.

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[41] [1933] A.C. 257.
[42] [1904] 1 K.B. 165, 169.
[43] [1901] 2 Ir.R. 67.
[44] [1947] Ch. 615.
[45] [1900] 1 Q.B. 442.
[46] [1901] 2 Ir.R. 67.
[47] [1901] 1 K.B. 285.
[48] 1918 S.C. 720.
[49] [1924] 2 K.B. 375.
[50] [1904] 1 K.B. 165.
[51] [1933] A.C. 257.

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[He also referred to *Colonial Bank* v. *Whinney*[52]; *Attorney-General* v. *Lloyds Bank Ld.*[53]; *Inland Revenue Commissioners* v. *Ayrshire Employers' Mutual Insurance Association Ld.*[54]; *Canadian Eagle Oil Co. Ld.* v. *The King*,[55] and *Cape Brandy Syndicate* v. *Inland Revenue Commissioners*,[56] mentioned in Green on Death Duties, 3rd ed., p. 3.]

Their Lordships took time for consideration.

1953. February 5. VISCOUNT SIMON. My Lords, this is an appeal from an order of the Court of Appeal (Evershed M.R., Jenkins and Birkett L.JJ.) which discharged an order dated December 20, 1950, made by Vaisey J. in the matter of a policy of assurance on the life of the plaintiff's father, Sir Osmond D'Avigdor-Goldsmid, Bt., deceased, on an originating summons wherein the appellant was the plaintiff and the respondents were the defendants. The question at issue in this appeal is whether estate duty should be paid on a sum of money amounting to £48,765, which was received in discharge of a life policy taken out by the deceased on May 3, 1904, for a sum of £30,000 with profits, under annual premiums of £695. At the time when the deceased took out the policy he was unmarried, but on his marriage in 1907 he brought into his marriage settlement the policy, together with certain freehold estates and investments. By the settlement the policy, with all bonus additions, was assigned by the deceased to trustees upon trust to receive the policy moneys at maturity and hold the same upon the trusts therein declared, and the deceased covenanted with the trustees to pay the premiums upon the said policy, which he did, as long as he had any interest in it. By subsequent dispositions, which it is not necessary to set out, the appellant, who was his eldest son, became absolutely entitled to the policy as from November 10, 1934, more than five years before the death of his father, which occurred on April 14, 1940. The appellant paid out of his own moneys the premiums under the policy from the time he became absolute owner of it.

The Crown claimed estate duty on the £48,765, either under section 2 (1) (*c*) of the Finance Act, 1894, or under section 2 (1) (*d*). As regards the first claim, Vaisey J. decided that no estate duty arose; the Court of Appeal came to the same conclusion, and this conclusion is not now challenged by the respondents. But on the alternative claim to duty under section 2 (1) (*d*) of the Act of 1894, the Court of Appeal reversed the decision of Vaisey J. that no duty was payable and held that the sum in question was property which must be deemed to pass on the death of the deceased within subsection (*d*).

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[52] (1885) 30 Ch.D. 261; (1886) L.R. 11 App.Cas. 426.

[53] [1935] A.C. 382, 393.

[54] 1946 S.C.(H.L.) 1, 8; 175 L.T. 22, 23; 27 Tax Cas. 331, 347.

[55] [1946] A.C. 119, 140.

[56] [1921] 1 K.B. 64, 71.

Subsection (*d*) brings within the charge of estate duty " any " annuity or other interest purchased or provided by the deceased, " either by himself alone or in concert or by arrangement with any " other person, to the extent of the beneficial interest accruing or " arising by survivorship or otherwise on the death of the " deceased." Assuming, therefore, that the life policy is covered by the words " other interest " in (*d*), it lies upon the Crown to prove that it was " provided by the deceased " and also that a " beneficial interest " in the policy accrued or arose on the death of the deceased. The policy was taken out and kept up by the deceased and assigned to the appellant with other assets in circumstances which made it the absolute property of the appellant in 1934 and onwards, and it may therefore be regarded as an " other " interest . . . provided by the deceased." The crucial question in the case is whether a " beneficial interest " in the policy arose at the deceased's death. The appellant contends that it did not, and if he is right the Crown's claim must fail.

A life policy is a piece of property which confers upon the owner of it the right, if certain conditions continue to be satisfied, to claim and be paid the policy moneys on the death of the person whose life is assured. These rights therefore belonged to the appellant from 1934 and were the beneficial interest in the policy which belonged to him from that moment. When the death occurred, he held these rights, and the quality of these rights was not changed by the death, which was merely the occasion when the rights were realized. There was therefore no new or additional beneficial interest in the policy which arose on the death of the appellant's father. For six years past, he had had absolute and unfettered ownership of the policy. As Vaisey J. pointed out [1] he " could have sold it, mortgaged it, given it away, destroyed it, " settled it, or (being a policy on his father's life) he could have " surrendered it at the moment when his father was at the point " of death." If he had done any of these things, the Crown could not have claimed to aggregate the policy moneys with the rest of the estate for the purposes of duty. It follows that no estate duty is payable on the £48,765, for no beneficial interest in the policy accrued or arose on the death of the deceased.

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[1] [1951] Ch. 321, 334.

I prefer to base my decision on this simple ground by taking the words of the statute and seeing whether the Crown brings the case within the section. We were referred to a large number of previous decisions which were alleged to throw light on the problem raised. It is enough to say that the Scottish decision of *Lord Advocate* v. *Hamilton's Trustees* [2] is in line with the conclusion at which I have arrived, and the argument in Lord Wark's opinion sets out a course of reasoning which I accept and apply in the present case. The judgment of Palles C.B. in *Attorney-General* v. *Robinson* [3] has received the close attention which is proper to be given to any pronouncement of that very learned judge, and the Chief Baron nine years later thought it right in *Richardson* v. *Inland Revenue Commissioners* [4] to add some observations upon his decision in *Robinson's* case [5] on the ground that it had been misapprehended. I confess that I do not find it easy to grasp the Chief Baron's argument and in particular do not appreciate the meaning of his statement [6] as to "an exact description of money secured by a "policy of insurance." The liability of the subject under a taxing statute ought not to be arrived at by a course of subtle and sophistical argument and, even in the case of the most learned judicial pronouncement, it is well to recognize that on rare occasions bonus dormitat Homerus.

I move that the appeal be allowed with costs.

Lord Porter. My Lords, I have had an opportunity of reading the opinion which the noble Lord on the woolsack has just delivered. I agree with it and have little to add.

It is plain that the Court of Appeal reached their conclusion by following the reasoning of Palles C.B. in *Attorney-General* v. *Robinson*,[7] a case which has, I think, influenced a number of decisions in this country, but has not been the subject of any direct approval in your Lordships' House. Indeed, in *Tennant* v. *Lord Advocate*[8] Lord Russell of Killowen expressly leaves open the question whether it correctly construes the language of the relevant Acts. He says: "For myself, I am not prepared to "accept without some further consideration the correctness of "the first step. Three authorities were cited as establishing it—

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[2] 1942 S.C. 426.
[3] [1901] 2 Ir.R. 67.
[4] [1909] 2 Ir.R. 597, 624.
[5] [1901] 2 Ir.R. 67.
[6] Ibid. 90.
[7] [1901] 2 Ir.R. 67.
[8] [1939] A.C. 207, 213.

"namely, *Attorney-General* v. *Dobree*,[9] *Attorney-General* v. "*Robinson*[10] and *Inland Revenue* v. *Scott's Trustees*.[11] No "doubt language is used in some of the judgments in those cases "which might give colour to the view that what passed on the "death was the cash, and not the policy or the value of the "policy; but in none of those cases was it material that any such "question should be decided."

The property referred to in those cases was a policy or policies of life insurance, and the first step to which the noble Lord referred was the proposition that the property which was subject to the duty consisted of the policy moneys, i.e., of the cash payable and paid by the insurance company and of nothing else. In other words, the property was the policy moneys, not the rights existent in the contract of insurance. That was, I think, undoubtedly the opinion of the Chief Baron, and it seems to have received a degree of acceptance by some of those members of other courts, and of the Court of Appeal in the present case, who hold that the "interest" consists of the right to receive the policy money when it becomes due at the death of the assured, and that the beneficial interest in that interest accrues or arises for the first time on the death. The Chief Baron in *Robinson's* case[12] expresses this view in plain terms when he says: "'Interest,' 'to the extent of the beneficial interest,' is not a "very happy expression; but the meaning is clear. The thing "subjected to taxation is 'the beneficial interest accruing or "'arising, by survivorship or otherwise, on the death of the "'deceased, in any annuity or in any other interest in property "'purchased or provided by the deceased,' as mentioned in that "section. The words 'accruing or arising' are used in contra-"distinction to 'passing.' They indicate, not the transfer upon "death to another of something which the deceased or some "other person had before or at the death, but the springing up, "upon the death, and the then vesting in another, of property "which previously had not been existing in anyone. This is an "exact description of money secured by a policy of insurance." His further explanation of the grounds for his decision, which are to be found in *Attorney-General* v. *Smyth*,[13] gives rise to certain difficulties, but in no way affects this part of his opinion.

If it is accurate to say that the interest which is aimed at in the subsection is the policy money when received and not the

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[9] [1900] 1 Q.B. 442.
[10] [1901] 2 Ir.R. 67.
[11] 1918 S.C. 720.
[12] [1901] 2 Ir.R. 67, 89, 90.
[13] [1905] 2 Ir.R. 553.

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contract of insurance represented by the policy, there does spring up for the first time on the death of the assured an interest which then and then only arises or accrues, and the Crown's contention is right. But in my opinion Lord Russell's doubts are fully justified, and I cannot accept the view that some fresh interest accrues to or arises in the beneficial holder of a policy on the termination of the life insured. From the date of the assignment to him in 1934 the appellant was the absolute owner of the policy and, subject to payment of the premium, entitled to receive the sum insured, with any bonus, when the stipulated time of payment, viz., the death, had been reached. He did not get a new interest; he obtained the fruition of the interest which he already held. As one of your Lordships expressed it in the course of argument, the value of the chose in action is increased, the interest of the beneficiary is not altered.

The Crown's claim under section 2 (1) (*c*) of the Act of 1894 has been dropped, and I find myself in agreement with the views of Vaisey J. as respects the claim under 2 (1) (*d*). Like him, I prefer the decision and the principle laid down in the Scottish case, *Lord Advocate* v. *Hamilton's Trustees*,[14] to those enumerated on behalf of the respondents, which I refrain from discussing further since they have been analysed in the opinion about to be delivered by Lord Morton of Henryton and I cannot usefully add to his remarks.

There is, however, another aspect of the case put forward by the Attorney-General which requires some consideration. He presented it in the following form: " If the ' other interest ' was " the policy and not the money payable and paid under its terms " upon the death, and no new beneficial interest then arose or " accrued, in that case, on the principles laid down in your " Lordships' House in *Adamson* v. *Attorney-General*[15] and on " the arguments presented on behalf of the appellant, there was " an increase in the value of the interest and that interest, " however small, fell to be taxed even in the state of the law " as existing when *Adamson's* case[15] was decided. That sum " would no doubt have been small at that time, but today that " fact is immaterial inasmuch as it has now been provided by " section 28 of the Finance Act, 1934, that: ' For the purposes of " ' paragraph (*d*) of subsection (1) of section 2 of the Finance Act, " ' 1894, where an annuity or other interest has been purchased or " ' provided by the deceased, either by himself alone or in concert

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[14] 1942 S.C. 426.

[15] [1933] A.C. 257.

" ' or by arrangement with any other person, the extent of any " ' beneficial interest therein accruing by survivorship or otherwise " ' on the death of the deceased shall be ascertained, and shall " ' be deemed always to have been ascertainable, without regard " ' to any interest in expectancy the beneficiary may have had " ' therein before the death.' " The result is, says the Attorney-General, that the whole value of the dutiable property is subject to tax.

My Lords, the difference in value between the moment when an assured man is in articulo mortis and the moment of his actual decease must be infinitesimal and I am not convinced, as at present advised, that the law would pay attention to so minute a sum. But there is, in my opinion, another reason for rejecting the argument. In *Adamson's* case [15] there was, as the majority of their Lordships held, a change in the interest of the beneficiaries: before the death they had a contingent interest which might have been divested; after it they had a vested interest. The reasoning is best seen in the observations of Lord Warrington.[16] He says: " In the present case the interest of each child was unquestion-" ably provided by the deceased, and is therefore to be deemed " to be included in the expression ' property passing on the death " ' of the deceased,' but only to the extent of the beneficial " interest accruing or arising on the death of the deceased. " Before his death each child had a beneficial interest, but one " that might be destroyed either by an exercise of the power of " appointment or by the death of the child in the lifetime of the " deceased: on his death without exercising his power the " beneficial interest of each child became absolute and inde-" feasible." Your Lordships' House so decided in *Adamson's* case,[17] and Lord Warrington's words set out the ground upon which the decision was based.

On that reasoning there was as a result of the death a change in the rights which each child enjoyed. Until it occurred he might have got all or nothing or some intermediate sum: afterwards his rights were finally determined. The case differs from the present one in which the rights of the appellant have not changed. He is and has been since 1934 full and absolute owner of the policy. All that has happened is that, though its value is greater, his interest is the same. It follows that in my view this alternative argument, like that previously presented, should not succeed. I would allow the appeal.

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[15] [1933] A.C. 257.

[16] Ibid. 277.

[17] [1933] A.C. 257.

LORD MORTON OF HENRYTON stated the facts and continued: My Lords, the only question before your Lordships' House is as to the claim for estate duty under section 2 (1) (*d*) of the Finance Act, 1894. I agree with Vaisey J. that this claim is unfounded, and I suspect that the Court of Appeal might have arrived at the same conclusion if that court had felt itself unfettered by authority. The Master of the Rolls, in delivering the judgment of the court, referred to a number of cases and expressed himself thus [18]: "In "this state of the authorities and particularly in view of the "express and unqualified approval accorded to *Attorney-General* "v. *Robinson* [19] by this court in *Attorney-General* v. *Murray*,[20] it "seems to us that, notwithstanding *Lord Advocate* v. *Hamilton's* "*Trustees*,[21] our duty is to apply to the present case the law "as laid down in *Attorney-General* v. *Dobree* [22] and *Attorney-"General* v. *Robinson*.[23]"

My Lords, it will be necessary shortly to refer to these and other cases, but for the moment I shall address my mind simply to the words of section 2 (1) (*d*) of the Finance Act, 1894. That subsection is as follows: "Property passing on the death of the "deceased shall be deemed to include the property following, "that is to say: . . . (d) Any annuity or other interest purchased "or provided by the deceased, either by himself alone or in "concert or by arrangement with any other person, to the extent "of the beneficial interest accruing or arising by survivorship "or otherwise on the death of the deceased."

An exemption from this provision was referred to in the course of the argument. It is contained in section 15 of the Act of 1894, which exempts by subsection (1) ". . . a single annuity not "exceeding fifty-two pounds purchased or provided by the "deceased . . . for the life of himself and of some other person "and the survivor of them, or to arise on his own death in "favour of some other person. . . ."

There are three conditions which must be satisfied in order to give rise to a claim for duty under section 2 (1) (*d*), namely:—(i) There must be an annuity "or other interest"; (ii) It must have been "purchased or provided by the deceased, either by "himself alone or in concert or by arrangement with any other "person"; and (iii) A beneficial interest therein must accrue or arise by survivorship or otherwise on the death of the deceased.

[18] [1951] Ch. 1038, 1071.
[19] [1901] 2 Ir.R. 67.
[20] [1904] 1 K.B. 165.
[21] 1942 S.C. 426.
[22] [1900] 1 Q.B. 442.
[23] [1901] 2 Ir.R. 67.

I have inserted the word "therein" in condition (iii), although it does not appear in the subsection, because it is manifest from the wording of the section that the duty is payable only if a beneficial interest *in the "annuity or other interest"* accrues or arises on the death of the deceased. If there were any doubt on this point it would be removed by the use of the word "therein" twice in section 28 of the Finance Act, 1934. The relevant part of that section is as follows: "For the purposes "of paragraph (*d*) of subsection (1) of section 2 of the Finance "Act, 1894, where an annuity or other interest has been purchased or provided by the deceased, either by himself alone or "in concert or by arrangement with any other person, the extent "of any beneficial interest therein accruing or arising by survivorship or otherwise on the death of the deceased shall be "ascertained, and shall be deemed always to have been ascertainable, without regard to any interest in expectancy the "beneficiary may have had therein before the death."

As to condition (i), I am content to assume, for the purposes of this appeal, that the policy is an "other interest" within the meaning of the subsection, although I have long felt, and still feel, grave doubt whether the legislature ever intended this curious phrase to apply to the absolute beneficial ownership of a policy of assurance. There is no decision of this House upon the point, and it is to be noted that "money received under a policy "of assurance" is singled out from other property and expressly subjected to estate duty in certain circumstances, by section 2 (1) (*c*) of the Act of 1894, incorporating section 11 of the Customs and Inland Revenue Act, 1889.

Condition (ii) is admittedly satisfied, in accordance with, and subject to, the provisions of section 30 of the Finance Act, 1939, by reason of the inclusion of No. 27 Wood Street in the property appointed to the appellant on November 10, 1934.

Has condition (iii) been satisfied in the present case? In my opinion it has not. The only "other interest" purchased or provided by the deceased (Sir Osmond) was the policy. That was what he owned in October, 1907, that was what he settled on October 22, 1907, and that was what was appointed to the appellant on November 10, 1934. The question to be decided is whether a beneficial interest *in the policy* accrued or arose on Sir Osmond's death. To that question there can, in my view, be only one answer. The whole beneficial interest in the policy passed to the appellant absolutely in 1934. No interests in expectancy were created, and the beneficial interest of the appellant in the policy immediately after his father's death was exactly the same as his beneficial interest in the policy immediately before his father's death. True it is that the property in which the appellant had a beneficial interest became more valuable by reason of the death, but he had at all material times the same beneficial interest in that property. The Attorney-General, if I understood him correctly, described this as a "metaphysical "conception," but to my mind it is a plain statement of fact; and if it is a correct statement of fact it is manifest that condition (iii) is not satisfied in this case.

I think that confusion has arisen in certain earlier cases because the court has regarded the moneys ultimately paid under the policy, instead of the policy itself, as the "other interest "purchased or provided."

The first case to which reference should be made is *Attorney-General* v. *Dobree*.[24] In that case the deceased settled a policy on his own life in trust for his wife for life with remainders over. He covenanted to pay the premiums and did so. The wife survived him and a Divisional Court (Darling and Channell JJ.) held that estate duty was payable, under section 2 (1) (*d*), on the sum payable under the policy.

Dobree's case [24] differs from the present case, for neither the wife nor her legal personal representatives could take anything unless she survived her husband, whereas in the present case it was certain, from 1934 onwards, that the appellant or his legal personal representatives would take the whole of the policy moneys, whether or not he survived Sir Osmond. It may be necessary to decide hereafter whether this difference was enough to justify the decision in *Dobree's* case.[24] For the moment I would only observe that both Darling J. and Channell J. appear to have thought that the "other interest" provided by the deceased was the sum paid by the assurance company on the death of the deceased and not the contractual right conferred by the policy. With this view I cannot agree.

In one respect at least *Dobree's* case [24] would seem to be wrongly decided, for if any beneficial interest accrued or arose on the death of the deceased, it was the wife's beneficial interest for her life, and duty was only payable on the principal value of the interest, ascertained in accordance with section 7 (5) of the Finance Act, 1894. Curiously enough, this point seems to have been overlooked in certain later cases to which our attention was directed.

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[24] [1900] 1 Q.B. 442.

Attorney-General v. *Robinson*[25] must be more fully considered, as the decision of the Court of Appeal in the present case was based largely upon it. In that case the court (Palles C.B. and Johnson and Boyd JJ.) had to decide (inter alia) whether estate duty became payable under section 2 (1) (*d*) of the Finance Act, 1894, on the death of John Robinson, who died on December 17, 1898, in respect of four policies of assurance. By his marriage settlement dated June 8, 1843, the deceased settled the four policies and his intended wife settled a sum of £3,500 belonging to her. The trusts, as stated in the report and in the judgment of Palles C.B.,[26] were as follows "upon trust as "to the moneys secured by the policies (when received), to pay "the income thereof to the wife for life, and after her death as "to the principal moneys for the children of the marriage, and "the trusts of the intended wife's moneys were to apply, after "the marriage, so much of the income thereof as might be "necessary to pay the premiums upon the policies, and to pay "the residue thereof to the deceased, the intended husband, for "life, and after his death to the intended wife for life, and after "the death of the survivor in trust for the children of the "marriage." From the date of the marriage the policies were kept up out of the income of the wife's moneys. The wife predeceased the husband, and the husband by his will appointed the moneys which should become payable under the policies as to £500 to one of his two sons and the balance in equal shares to his other son and to his daughter. It will be observed that the trusts in favour of the children are very briefly stated, but it is clear that the survivor of the husband and wife had power to appoint among the children (and possibly remoter issue) of the marriage, and it may fairly be assumed that in default of appointment the children took the policy moneys in equal shares.

The case is distinguishable from the present case. Immediately before the death of their father, the children were defeasibly entitled, in equal shares, to the policy and the fruits thereof. Their father's will took effect at his death; thereupon the children became entitled absolutely and indefeasibly, but in different shares. In such a case it may be that beneficial interests accrued or arose on the father's death, within the meaning of section 2 (1) (*d*), but the reasons given by the Chief Baron for his decision are open to criticism. My noble and learned friend on the woolsack has already referred to a passage which occurs in the report.[27] I share his difficulties as to this passage, and I would add that I find it equally difficult to understand the reasoning by which, in *Richardson* v. *Inland Revenue Commissioners*,[28] the Chief Baron sought to explain his finding that the deceased "purchased or provided" the policy moneys. I have studied the judgment of the Chief Baron (with which his brethren agreed) with the care and respect which is due to any utterance of that great judge, but I can derive no assistance from it in the present case.

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[25] [1901] 2 Ir.R. 67.

[26] Ibid. 87.

The case of *Attorney-General* v. *Hawkins*[29] is not directly in point but it is interesting to note that both members of the court mentioned, by way of contrast, the case of an absolute assignment of the whole beneficial interest in a policy to a beneficiary, and clearly took the view that such a case would not fall within section 2 (1) (*d*). See *per* Kennedy J.[30] and *per* Phillimore J.[31] In reading the latter passage it is necessary to note the "Errata" which appear at the beginning of the volume.

In *Attorney-General* v. *Murray*[32] the decision of the Court of Appeal was directed to the question whether a policy of assurance effected by a father on his son's life and settled on his son's marriage was or was not "purchased or provided" by the son in concert or by arrangement with the father, within the meaning of section 2 (1) (*d*), but in the course of the case it was argued that a policy was not an "other interest" within section 2 (1) (*d*) and also that[33]: "The whole beneficial interest in the contingent "debt passed under the settlement on the marriage, and the "wife had no greater beneficial interest in it by reason of the "husband's death than she had as soon as the marriage took "place"; and reference was made to *Attorney-General* v. *Dobree*[34] and *Attorney-General* v. *Robinson*.[35] Cozens-Hardy L.J., in delivering the judgment of the court, said[36]: "Secondly, it is "contended that a policy of insurance is not an interest within "subsection (1) (*d*). We have not been able to appreciate this "argument. A policy is plainly property within the scope of "section 2, and we can see no ground for excluding it from sub-"section (1) (*d*). We are content to adopt the reasoning of

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[27] [1901] 2 Ir.R. 67, 90.
[28] [1909] 2 Ir.R. 597, 624.
[29] [1901] 1 K.B. 285.
[30] Ibid. 291–4.
[31] Ibid. 294–7.
[32] [1904] 1 K.B. 165.
[33] Ibid. 169.
[34] [1900] 1 Q.B. 442.
[35] [1901] 2 Ir.R. 67.
[36] [1904] 1 K.B. 165, 172.

"Palles C.B. in *Attorney-General* v. *Robinson*,[37] and we do not "think any good object would be attained by attempting further "to elaborate it." The Court of Appeal in the present case [38] read the last sentence just quoted as "express and unqualified "approval accorded to *Attorney-General* v. *Robinson*."[39] It will have appeared already that I cannot share that approval.

In *Inland Revenue* v. *Scott's Trustees* [40] the Inner House had to consider the terms of a settlement of policies by a father upon somewhat unusual trusts for the benefit of his daughters and their issue. The facts differed widely from the facts of the present case, and need not be set out at length, but I share the doubts expressed by Lord Sands as follows [41]: "These policies belonged, after the "creation of the trust, to certain trustees for behoof of certain "beneficiaries. Now, no doubt when a man dies who has insured "his own life the policy upon his life is part of his estate, and in "respect of that part of his estate a beneficial interest accrues to "his executors. But I confess I entertain some doubt as to "whether, where one already holds as one's own property a policy "of insurance on the life of another party, any beneficial interest "that was not in the holder before accrues to him at the time of "the death of the person whose life is insured. The policy which "he had in bonis simply matures." I would add that even if estate duty was payable in *Scott's* case [42]—as to which I express no opinion—I see no reason why it should have been payable on the whole of the policy moneys, rather than on the principal value of the daughters' life interests.

I gratefully adopt the words of the Master of the Rolls [43] in summarizing the next three cases:

"In *Attorney-General* v. *Pearson* [44] liability to duty under "section 2 (1) (*d*) on the policy moneys in question was not disputed, but it was claimed that the exemption from aggregation "afforded by section 4 of the Finance Act, 1894, to property in "which the deceased never had an interest was applicable. Rowlatt J. held that the exemption did not apply. The question "with which we are now concerned was, therefore, not in issue. "But Rowlatt J. said of section 2 (1) (*d*) [45]: 'That the policy "'moneys in a case like this are liable to duty under that

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[37] [1901] 2 Ir.R. 67.
[38] [1951] Ch. 1038, 1071.
[39] [1901] 2 Ir.R. 67.
[40] 1918 S.C. 720.
[41] Ibid. 726.
[42] 1918 S.C. 720.
[43] [1951] Ch. 1038, 1068–70.
[44] [1924] 2 K.B. 375.
[45] Ibid. 387.

"'subsection is clear upon the authorities beginning with the "'Irish case of *Attorney-General* v. *Robinson.*'[46]

"*Tennant* v. *Lord Advocate*[47] was another case on the question of aggregation, liability to duty under section 2 (1) (*d*) being "admitted. Lord Russell of Killowen said[48]: 'For myself, I am "'not prepared to accept without some further consideration the "'correctness of the first step.' (He was referring here to a contention that what passed on the death was 'the cash payable by "'the insurance company and nothing else.') 'Three authorities "'were cited as establishing it, namely, *Attorney-General* v. "'*Dobree*[49]; *Attorney-General* v. *Robinson*[50]; and *Inland* "'*Revenue* v. *Scott's Trustees.*[51] No doubt language is used in "'some of the judgments in those cases which might give colour "'to the view that what passed on the death was the cash, and "'not the policy or the value of the policy; but in none of those "'cases was it material that any such question should be decided. "'Indeed, it is not easy to see how the question can ever become "'material. The policy must, if valued, be valued as a matured "'policy and with reference to the solvency of the insurance company, with the result that the value of the policy will be the "'same as the value of the moneys payable thereunder. But I "'would wish to keep the question open in case it should ever "'hereafter be necessary to decide between the two alternatives.'

"With respect to these observations, it is proper to note that "counsel for the Crown had not been called upon to argue. His "Lordship went on to decide that the policy moneys were to be "aggregated, expressing agreement with Rowlatt J.'s decision in "*Attorney-General* v. *Pearson.*[52]

"In *Westminster Bank Ld.* v. *Attorney-General*[53] the point at "issue was again aggregation, and was decided in favour of the "Crown on the authority of *Tennant* v. *Lord Advocate*,[54] which "had been decided between the conclusion of the hearing and the "delivery of the reserved judgment of the Court of Appeal. But "Clauson L.J. delivering the judgment of the court said[55]: 'The "'first step is to ascertain with precision what it is that is deemed "'to pass on the death of Sir Frederick in respect of the policy "'moneys by reason of the operation of section 2 (1) (*d*). The

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[46] [1901] 2 Ir.R. 67.
[47] [1939] A.C. 207.
[48] Ibid. 213.
[49] [1900] 1 Q.B. 442.
[50] [1901] 2 Ir.R. 67.
[51] 1918 S.C. 720.
[52] [1924] 2 K.B. 375.
[53] [1939] Ch. 610.
[54] [1939] A.C. 207.
[55] [1939] Ch. 610, 618.

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" ' answer, in the words of the subsection, is " the interest provided by the deceased to the extent of the beneficial interest accruing or arising on the death of the deceased." The interest provided by the deceased is the amount of the policy moneys including the bonuses. It is not, however, the whole of that sum which is deemed to pass; that sum is deemed to pass only to the extent of the beneficial interest accruing or arising on the death of the deceased. In the present case the extent of the beneficial interest so arising is commensurate with the life interests which spring into being on the death of Sir Frederick, that is to say the life interests, whether vested or contingent, on attaining 21 or marrying of the five children of Mrs. van der Goes living at the testator's death. It follows that that which passes in respect of the policy moneys is so much thereof as is equivalent to the value of those life interests therein.' "

No one of these three cases is directly in point, but if Rowlatt J. and Clauson L.J. took the view that the " interest provided " was the policy moneys and not the policy itself, I cannot agree with them, and I do not think Lord Russell of Killowen would have agreed with them, if it had been necessary for him to decide the point.

Lastly I come to *Lord Advocate* v. *Hamilton's Trustees*.[56] In that case the deceased, who died in 1936, had in 1912 settled certain policies on his life on trusts for the benefit of his sons and daughter. The sons were to become absolutely entitled on attaining the age of 25 and the daughter's share was settled on her for life with remainders over. The trust deed stated that these provisions in favour of the children " shall vest in them respectively " at the date hereof." The policies became fully paid in 1914 and 1915, and the premiums payable in the meantime were borrowed by the trustees from the deceased. On the deceased's death, duty was claimed under section 2 (1) (*d*) on the amount of the policy moneys less the amount borrowed from the deceased by the trustees in order to pay the premiums, and the claim was rejected by the Inner House, affirming the Lord Ordinary (Lord Keith) on the grounds (1) that in the circumstances " the property sought " to be charged had not been provided by the deceased," and (2) " that there was no beneficial interest accruing or arising on the " death of the deceased, in respect that the whole interest in " the policies had passed to the beneficiaries 24 years before the

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[56] 1942 S.C. 426.

"truster's death, their interest having fully vested." It is unnecessary for the present purpose to consider the first of these two grounds, but in my view the second ground was correct.

Lord Keith used language which applies very aptly to the present case. He said [57]: "In the present case, it is undoubted "that an interest vested in the beneficiaries under the deed of "trust at the date thereof, and the death of the truster made no "difference to that interest. If the sons had predeceased their "father, their shares of the proceeds of the policies would have "been paid over to their executors. I have difficulty in seeing how "a beneficial interest accrued or arose to them, by survivorship "or otherwise, on the death of the deceased. What accrued to "them or to the trustees was a present right to demand payment "from the insurance company in respect of a previously existing "beneficial interest."

I agree with the reasoning which I have just quoted.

I would allow the appeal and restore the order of Vaisey J.

Lord Reid. My Lords, in 1934 there were transferred to the appellant an insurance policy on the life of Sir Osmond D'Avigdor-Goldsmid and also property the income from which was sufficient to pay the insurance premiums. The appellant was under no obligation to keep up the policy or to retain the property transferred to him: he became the absolute owner of both the policy and the property. In fact he paid the premiums and kept up the policy and on the death of Sir Osmond in 1940 he received from the insurance company £48,765. Estate duty is claimed on this sum under section 2 (1) (*d*) of the Finance Act, 1894. That subsection is in the following terms: "Property "passing on the death of the deceased shall be deemed to "include the property following, that is to say:—(*d*) any "annuity or other interest purchased or provided by the deceased, "either by himself alone or in concert or by arrangement with "any other person, to the extent of the beneficial interest "accruing or arising by survivorship or otherwise on the death "of the deceased."

I shall assume that the policy (or the money payable under it) was an "other interest" within the meaning of this enactment and it was conceded that, in view of section 30 of the Finance Act, 1939, this interest must be regarded as having been provided by Sir Osmond. The only question to be decided in this case is whether any beneficial interest within the meaning of the subsection arose or accrued on the death of Sir Osmond. I think that the terms of the subsection make it reasonably clear that what is meant is a beneficial interest in or in respect of the interest provided. If "beneficial interest" merely meant a financial benefit, then the Crown must succeed, because the policy was obviously worth much more immediately after the death of Sir Osmond than it had been immediately before. But I have no doubt that that is not its meaning. In the first place the words "beneficial interest" in section 2 (1) (*d*) are in marked contrast with the word "benefit" in section 2 (1) (*b*), where the phrase used is "to the extent to which a benefit accrues or "arises": in the absence of strong reasons to the contrary one must assume that when Parliament uses different words in similar contexts in the same section it means different things, and I find nothing in the Act to rebut this presumption. And, secondly, in the decided cases that has not been held to be its meaning. In the cases where the Crown has succeeded it has been because it was held that some right or property of a different kind from that previously enjoyed by the beneficiary arose or accrued on the death, or the right of the beneficiary was in some way enlarged or altered and not merely because the beneficiary's existing right became more valuable after the death.

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[57] 1942 S.C. 426, 434.

In the present case the appellant was absolute and unfettered owner of the policy before Sir Osmond's death and he remained absolute and unfettered owner after the death. That is not disputed. The argument of the Attorney-General, as I understood it, was twofold. In the first place he argued that the interest provided by Sir Osmond was not the policy but the money paid under it and that this money (or the right to receive it) came into existence for the first time on the death of the assured. There is high authority for this, but with all respect to the judges who have expressed that opinion I find it hard to understand. If the sum assured were the interest to which the subsection refers, then the rest of the argument might be valid. But that would seem to involve as a consequence that the interest did not exist and therefore could not be provided before the death. To my mind it is plain that something did exist and was provided in 1934 when the policy was assigned to the appellant: indeed, as the policy had been taken out in 1907 it must have been of very considerable value in 1934 either by way of surrender value or as a realizable asset. And moreover it appears to me to be equally plain that nothing was provided after 1934. So I find it impossible to avoid the conclusion that what was provided was the policy. And to say that the policy was provided is merely a short way of saying that what was provided was the contractual right against the insurance company which the assured obtained when he entered into a contract with the company or took out the policy. That contractual right was assigned to the appellant, and it was by virtue of that contractual right alone that the appellant ultimately obtained payment of the £48,765. It is true that the company was only bound to pay if the assured and in his turn the appellant fulfilled their part of the contract by paying premiums, etc.: but, this having been done, the contractual right originally acquired by the assured remained in force until the date of payment arrived and the money was paid.

It was then argued that, if what was provided was the policy, a new beneficial interest in respect of it arose at the death because then for the first time there arose a right to sue for the sum due under the policy: before the death the appellant only had a contingent future right, but after the death he had a new and different right—a right to get the money. This argument is not based on any peculiarity of a contract of insurance, and if it is right it seems to me necessarily to lead to the conclusion that, whenever a creditor is owed money payable at a future date, his right after the date of payment has come is a new right different from the right which he had before that date. That seems to me to be a novel doctrine and to neglect the fact that the rights of contracting parties flow from the contract: a new right would require a new contract. From the beginning the creditor's right was to be paid on a certain day, and the coming of that day does not create a new right, it merely enables him to enforce his old right. And I do not see why it should make any difference if the date of payment is determined not by the calendar but by the occurrence of an event such as death, whose date cannot be predicted. Nor do I see why it should make any difference that the creditor has had to perform his part of the contract between the date when it was made and the date of payment. I must, therefore, also reject this argument.

The Attorney-General also submitted an argument based on the analogous case of an annuity. He argued in effect that if the policy transferred to the appellant had not been for payment of a lump sum on the death of Sir Osmond but had been for

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payment of an annuity payable to Sir Osmond's executors or assigns for a period of, say, 10 years commencing at Sir Osmond's death, then section 2 (1) (*d*) would certainly have applied. If that were so it would be a strong argument because, looking to the initial words of the subsection, "any annuity or other interest," it would be difficult to hold that Parliament intended that a different rule should apply merely because the policy moneys were payable in ten instalments instead of in a lump sum. But I am not at all convinced that this argument with regard to annuities is right: in that case also no duty is payable unless a beneficial interest accrued or arose on the death. The Attorney-General laid stress on the terms of section 15 of the Act of 1894. That section exempts certain small annuities from duty. It does not say and I do not think that it means that, no matter what the circumstances may be, every annuity of the kinds which it mentions would necessarily fall within the scope of section 2 but for its provisions. It is an exempting section, and it appears to me to be more natural to read it as meaning that an annuity which would otherwise fall within the scope of section 2 is exempted if it complies with the requirements of section 15. That would leave it open to say in a particular case that an annuity does not need to be exempted because the circumstances are such that it never came within the scope of section 2.

I shall not detain your Lordships by discussing the authorities again. They cannot all be reconciled and I have thought it desirable to examine the whole matter afresh and to deal as directly as I could with the main arguments submitted for the respondents. I agree with your Lordships that this appeal should be allowed.

LORD ASQUITH OF BISHOPSTONE. My Lords, I respectfully concur with the opinions, which I have had the advantage and pleasure of reading in print, of the noble Viscount on the woolsack and of Lord Morton of Henryton. Disengaged from certain clinging and obscuring draperies, the point seems to me a short one. It turns on the meaning, in section 2 (1) (*d*) of the Finance Act, 1894, of two terms: "other interest" and "beneficial "interest." "Other interest" in this context seems to me to cover, and on the facts of this case specifically to denote, the benefit of the policy: *viz.*, the contractual rights conferred by it, whether on its original holder or its assignee. These rights included the right to exact payment of the insurance moneys in an agreed and specified event, namely, the death of Sir Osmond. The policy, the vehicle of this right, was assigned out and out to Sir Osmond's son, the appellant, over five years before his father's death.

The "beneficial interest" referred to in the concluding lines of the material sub-paragraph was a beneficial interest in the "other interest" referred to in its opening lines. It is a clumsy collocation of terms no doubt, but it must mean a beneficial interest in a contractual right to exact £X if and when Sir Osmond should die. This beneficial interest has never altered in quality from the time of the assignment till the day of Sir Osmond's death, or until the day after it. The death has not generated a new beneficial interest. What it has done is to enhance the value of the "other interest" in which the beneficial interest subsisted. The "other interest" (consisting of the contractual rights under the policy) bore in its womb the "promise and potency" of this enhancement from the start. To say that the "beneficial interest" therein sprang into life "on the death" seems to me wholly false. If I buy an apple tree and it subsequently bears fruit, I am beneficially interested in the fruit from the start.

In these circumstances I can see no answer to the reasoning which has moved my Lords to allow the appeal, and like them I would allow it.

Wilfrid Hunt. Will your Lordships allow me to make this application: that this is such a special case that the costs of the appellant in this House with three counsel should be allowed?

It is a case in which, as your Lordships remember, three counsel appeared for the respondents—the Attorney-General, the Solicitor-General and Mr. Stamp. It occupied six whole days.

My application is limited to the hearing in this House. The case took a great deal longer than in the Court of Appeal. It was gone into much more fully. It demanded an investigation of a very large number of authorities, many of which were cited to your Lordships, some of which were not. A considerable amount of money is involved. A point of the very greatest importance with regard to death duties was in question, and your Lordships have decided it.

Under a ruling of the Appeal Committee in 1909 the costs of three counsel are, I agree, allowed only "in special cases." That ruling is as follows[58]: "The Appeal Committee resolved that, "except in special cases, no costs should be allowed in taxation "for more than two counsel of a side in appeals. . . ."

Viscount Simon. The practice in the old days used to be that the Crown got an order for three counsel if the Attorney-General certified that, in his opinion, three counsel were necessary. Then that rule was altered. I have before me the ruling given by Lord Macnaghten in *Denaby & Cadeby Main Collieries Ld.* v. *Yorkshire Miners' Association*,[59] in which an application was made by the Yorkshire Miners' Association to be allowed the costs of three counsel. Lord Macnaghten then laid it down that it was not the general rule. As regards that particular case, there was nothing very special about it, and the decision was that the costs of three counsel should not be allowed. My own recollection and experience is that the costs of three counsel are very seldom allowed in this House.

Wilfrid Hunt. This is a case in which the Attorney-General, the Solicitor-General and Mr. Stamp appeared, so the Crown thought it was a proper case in which to have three counsel.

Viscount Simon. The Crown will have to pay their own costs.

Lord Morton of Henryton. What is there special in a case which involves the construction of a few words in a statute?

Wilfrid Hunt. Very often it would not be special, but here it involved going carefully into a very large number of authorities, many of which had to be cited. It is a case of the utmost importance in the law. I submit that in those circumstances it is a special case.

We had three counsel in the Court of Appeal, but we lost. Before Vaisey J., the trial judge, we had three counsel, but though we were successful we did not apply for the costs of those counsel as the case took a comparatively short time; it did not involve anything like the same investigation of masses of authorities as in your Lordships' House, where the hearing occupied six whole days. In the Court of Appeal it took only four days, when it involved a larger question, so that it was gone into very much more fully before your Lordships, and did involve a much greater amount of work on the part of counsel.

Viscount Simon. I do not think we can accede to this application. I do not say it is absolutely impossible to persuade the House of Lords to allow the costs of three counsel. But I

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[58] [1909] W.N. 184.

[59] [1907] W.N. 2.

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think you must take your victory and reflect, with satisfaction, that you have got the costs of two counsel. We agree the case was of some difficulty, and we have approached it with great gratitude to counsel on both sides; but we do not think this is a case in which the costs of three counsel should be allowed.

Appeal allowed.

Solicitors: *Frere, Cholmeley & Nicholsons; Solicitor of Inland Revenue.*

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Feb. 2, 3, 4; *March* 9.

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AND

CITY OF GLASGOW POLICE ATHLETIC ASSOCIATION . . . . . . RESPONDENTS.

Revenue—Income tax—Charity—Police athletic association—Profits of annual sports meeting—" Established for charitable purposes only " —Appeal from Special Commissioners—Jurisdiction of Court of Session—Finance Act, 1921 (11 *&* 12 *Geo.* 5, *c.* 32), *s.* 30 (1) (*c*), (3) *—Finance Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 36), *s.* 19*—Finance Act,* 1927 (17 *&* 18 *Geo.* 5, *c.* 10), *s.* 24.

A police athletic association claimed exemption from income tax under Sch. D on the profits of their annual sports meeting:—

Held (*per* Lord Normand, Lord Morton of Henryton, Lord Reid and Lord Cohen, Lord Oaksey dissenting) that the exemption could not be granted because the association was not "established for "charitable purposes only" within section 30 of the Finance Act, 1921. Though the Commissioners were entitled to find that the purpose of increasing the efficiency of the force for the advantage of the public was charitable, the purpose of providing recreation for the members was non-charitable and was not merely incidental to the charitable purposes.

Since the English law of charity must for income tax purposes be regarded as part of the law of Scotland and not as foreign law, it is the duty of the Court of Session in such cases to administer that law and to determine as matters of law questions in regard to it.

Decision of the First Division of the Court of Session 1952 S.C. 102 reversed.

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* *Present*: LORD NORMAND, LORD OAKSEY, LORD MORTON OF HENRYTON, LORD REID and LORD COHEN.

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INLAND REVENUE COMMISSIONERS *v.* CITY OF GLASGOW POLICE ATHLETIC ASSOCIATION.

APPEAL from the First Division of the Court of Session.

This was an appeal against an interlocutor dated December 19, 1951, pronounced by the First Division of the Court of Session, as the Court of Exchequer in Scotland, in a case stated under section 149 of the Income Tax Act, 1918, by the Commissioners for the Special Purposes of the Income Tax Acts. By the interlocutor the court refused to reverse the determination of the Special Commissioners.

The Special Commissioners at a meeting held in Glasgow on April 6, 1951, held that the respondents, the City of Glasgow Police Athletic Association, were a charity within the meaning of the definition in section 30 (3) of the Finance Act, 1921,[1] and (it being conceded at the outset of the hearing before them that, on this footing, the remaining conditions of section 30 (1) (*c*), amended by section 24 of the Finance Act, 1927, were satisfied), they accordingly allowed the respondents' claim that the profits of a trade, namely, the holding of annual sports, carried on by them, were exempt from income tax under Sch. D. The appellants, the Commissioners of Inland Revenue, required the Special Commissioners to state a case for the opinion of the Court of Session. They framed the question as follows: "The question "of law for the opinion of the court is whether the City of "Glasgow Police Athletic Association is within the meaning and "for the purposes of section 30 of the Finance Act, 1921 (as "amended by section 24 of the Finance Act, 1927), a charity, "namely, a body of persons established for charitable purposes "only." The First Division of the Court of Session answered the question of law in the sense favourable to the respondents and refused the appeal. The appellants appealed to the House of Lords.

The facts found in the case stated and summarized by Lord Normand were as follows: In para. II (1) of the case stated it was set out that: "Prior to 1938 there were various clubs connected "with the City of Glasgow Police. In February, 1938, these "clubs were merged in the association, which was established at

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[1] By s. 30 (1) (*c*) of the Finance Act, 1921, as amended by s. 24 of the Finance Act, 1927, exemption shall be granted "from income tax under "Sch. D in respect of the profits of a "trade carried on by any charity, if "the profits are applied solely for the "purposes of the charity and either "—(i) the trade is exercised in the "course of the actual carrying out of "a primary purpose of the charity; "or (ii) the work in connection with "the trade is mainly carried on by "the beneficiaries of the charity."

By subs. (3): "In this section "the expression 'charity' means any "body of persons or trust established "for charitable purposes only."

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"that date with the purpose of co-ordinating the various athletic "and sporting activities of the members of the police force."

The following are excerpts from the general rules of the association: ". . . 2. *Objects.*—The objects of the association "shall be to encourage and promote all forms of athletic sports "and general pastimes. 3. *Officers.*—. . . The Chief Constable "shall be president and the Assistant Chief Constables and "superintendents of the force shall be vice-presidents. . . . "4. *Management.*—The management of the association shall be "vested in an executive committee, divisional activities by a "divisional committee, and each branch of sport or pastime by "a sectional committee. . . . 5. *Committees.* (1) *Executive* "*Committee.*—The executive committee shall consist of the "president, two vice-presidents, one representative from each "divisional committee, one representative from each sports "sectional committee, the honorary general secretary and the "honorary treasurer, 10 to form a quorum. . . . (2) *Divisional* "*Committees.*—The annual general meeting of each division "shall be held in the second week of September. . . . The "business to be transacted at such meetings shall be . . . "(*b*) to elect the divisional committee, consisting of superintendent, lieutenant, inspector, two sergeants and five constables. ". . . 8. *Membership.*—Ordinary membership shall be restricted "to officers and ex-officers of the City of Glasgow police force. ". . . 10. *Subscriptions.*—The subscription for each serving "member shall be 3d. per week deducted from pay. . . . "21. *Alteration of Rules.*—None of the foregoing rules shall be "altered or revoked save by a two-thirds majority of those "present at the annual general meeting or at a special meeting "called for the purpose. . . . 23. *Sanction of Chief Constable.* "—All resolutions and decisions passed at all meetings of the "association are subject to the approval of the Chief Constable."

Membership of the association was, until 1947, a condition of service for all new entrants into the Glasgow police force. In 1948 membership became voluntary but in fact all recruits continued to join the association. The present membership was about 85 per cent. of the force, and there were in September, 1950, nine ex-officers who retained their membership. Ex-officers could render useful services as coaches. The activities of the association included angling, athletics, badminton, billiards, bowling, boxing and wrestling, cricket, association football, golf, rugby football, shooting, swimming and training in life saving, table tennis, dances, 'bus runs, "mystery tours" by 'bus, and whist drives. Sports were held in May of each year as a preparation for the annual sports, the "trade" carried on by the association for the purpose of raising funds. These annual sports were held on the ground of an amateur association football club, the use of which was given without charge. There was an attendance of about 50,000 people, who paid for entry, and the profits were applied solely to the purposes of the association. Some events were confined to members of the association, others to members of other police clubs in Great Britain. But the majority of the events were open to all amateurs, including members of the association. Efforts were made to have some outstanding competitors to attract the public. The members of the association controlled the sports, the spectators and the traffic, and no charge was made for the services of the police. The net proceeds were paid into the general fund of the association. In the year ended September 30, 1950, the total revenue of the association was £2,778, of which £1,225 was derived from members' subscriptions and £1,214 from profits of the annual sports. The association was affiliated to the Police Athletic Association, a body whose rules were approved by the Home Secretary and the Secretary of State for Scotland, and whose objects were to encourage the development of all forms of amateur sport in the police forces and to promote and control suitable competitions and championships. The relations between the respondent association and the Glasgow police force were close, and the association was regarded as an essential part of the police organization. It played a valuable part in maintaining health, morale and esprit de corps. It helped to bring the force into friendly contact with the public, and it enabled the members of the association to mix with members of other professions and trades. The hours of police duty made it almost essential that some special provision should be made for the recreation of the police.

In para. V (*f*) the commissioners found as a fact: "The exist-"ence and activities of the respondent association—(i) played an "important part in the maintenance of physical fitness, health, "morale and esprit-de-corps within the force; (ii) attracted "recruits to the force; (iii) helped to maintain the strength and "efficiency of the force by conducing to a contented force, "keeping members happy in their work and inducing them to "continue in the force, rather than leave it; (iv) conduced to the "public order by promoting good relations between the force and "the general public; (v) increased the efficiency of the force "generally, and thereby directly benefited the public."

Lord Advocate Clyde, J. H. Stamp and *Sir Reginald Hills* (both of the English Bar) and *Grieve* (of the Scottish Bar) for the Crown. The Court of Session is competent to decide a question of this sort. The jurisdiction has been conferred on it to hear appeals on points of law in such cases as this. The question in this case is a point of law for the Scottish court: see *Commissioners for the Special Purposes of the Income Tax* v. *Pemsel.*[2]

The question in the present case arises on the Finance Act, 1921, s. 30 (1) (*c*), (3). The main question and the only one argued is whether the association is charitable within subsection (3). To be so it must come within the intendment of the statute 43 Eliz. 1, c. 4. In that Act the words "given limited appointed "and assigned" are important and exclude a mere association of persons making yearly contributions for their common benefit. This is not a body of persons established for charitable purposes only if charitable purposes are interpreted according to the law of England, in the light of the English decisions and applying the general spirit of English legal interpretation. Further, the expression "charitable purposes" has a narrower meaning in Scotland than in England.

The real essence of a body must be found by looking at its articles of association, and the rules of this body confirm that it is not charitable. Under its rules its object is to co-ordinate the athletic and sporting activities of members of the Glasgow police force: see rule 2. The purposes of an athletic and recreational club such as this are not within the category of charitable. All the association's revenue is spent on activities in which the members alone take part. Nothing in the matters referred to by the Special Commissioners in para. V (*f*) of the case stated affects the legal nature of rule 2 or of the association's powers under its rules to deal with its property and funds.

In *Commissioners for the Special Purposes of the Income Tax* v. *Pemsel*[3] Lord Macnaghten set out the principal divisions of charity in the legal sense. The association could only fall within the final category ("other purposes beneficial to the community"), and it does not do so.

There is a distinction between a body which can be brought to an end by the voluntary action of its members and an undying association which may change but still lives on. This association belongs to the former class. It is a group of private individuals and the only trust constituted is not a trust for any public purpose but one for the benefit of the members. Any public benefit resulting from the fact of making the police force more efficient is only incidental to its operation, so that the fact that it has the result of indirectly benefiting the Glasgow police force, and that it is approved by the police authorities, is inconclusive. The relevant question is: What does the association do? It is not: What are the consequences of its carrying out its functions? The purpose of the association is to benefit members of the police force, though it may incidentally confer a public benefit. In order to make it charitable one would have to find a charitable purpose, not merely a charitable consequence. One has to look at the purpose of the persons who put the money up, the subscribers, as distinct from the originators. That purpose is found by interpreting the rules in the light of all the facts.

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[2] [1891] A.C. 531, 586.

[3] Ibid. 583.

The Civil Service or the Coal Board might establish such associations as this but they would not be charitable; otherwise one would not know where to stop. Both these organizations are performing essential work for the community and it is in the public interest that their employees should be contented and happy. But to hold that their athletic associations were charitable would be opening the door too wide.

Neither the Attorney-General nor the Lord Advocate would have the jurisdiction to say that the members of this association could not use its funds in any way they wish or wind it up and devote the funds to some other object. They could not restrain the Chief Constable from sanctioning a resolution, validly passed, to do that. This is not a case where a cy-près scheme would be at all appropriate. No voluntary association can take advantage of these tax relief provisions unless it can show that if its charitable undertaking were given up the funds would have to be employed in another charitable object.

The Crown's case may be summarized as follows: (1) This is not a trust set up under a bequest but a voluntary association of individuals, a private club: *In re Hobourn Aero Components Ld.'s Air Raid Distress Fund.*[4] (2) The association is not for the United Kingdom police forces, or even for the Glasgow police force, but only for such members of the latter as choose to join;

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[4] [1946] Ch. 86, 194.

it is essentially voluntary in outlook. (3) It can be wound up and its funds distributed as the members choose, subject only to the Chief Constable's approval: *Anderson's Trustees* v. *Scott.*[5] (4) The mere fact that the association involves some public benefit does not render it established for charitable purposes only: *Rex* v. *Special Commissioners of Income Tax; Ex parte The Headmasters' Conference* [6]; *Geologists' Association* v. *Inland Revenue Commissioners* [7]; *General Nursing Council for Scotland* v. *Inland Revenue Commissioners* [8]; *Oxford Group* v. *Inland Revenue Commissioners.*[9] (5) The fact that the association can lawfully expend funds on non-charitable objects puts it outside the benefit intended by the Act: *National Anti-Vivisection Society* v. *Inland Revenue Commissioners.*[10]

In re Good,[11] *In re Gray* [12] and *In re Foveaux,*[13] relied on by the Special Commissioners, do not help the respondents. Though the principles enunciated in the first two are correct, it is doubtful whether these decisions were right on the facts. But *In re Good,*[14] which was followed in *In re Gray,*[15] may be justified on the ground that it came within the words "setting out of soldiers" in the statute of Elizabeth I and that the mess was part of the regiment and so directly associated with the defence of the realm. The gift there was for an integral element in a purely public body, a regiment in the Army. There is a vital distinction between such a body and the present association to which no member of the Glasgow police force is obliged to belong, which is open to retired members of the force and which has the absolute disposal of its funds. *In re Foveaux* [16] was the subject of adverse comment in *National Anti-Vivisection Society* v. *Inland Revenue Commissioners.*[17]

[They also referred to *Baird's Trustees* v. *Lord Advocate* [18]; *Blair* v. *Duncan* [19]; *Trustees of Wernher's Charitable Trust* v. *Inland Revenue Commissioners* [20]; *Royal College of Surgeons of England* v. *National Provincial Bank Ld.,*[21] and *Williams' Trustees* v. *Inland Revenue Commissioners.*[22]]

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[5] 1914 S.C. 942.

[6] (1925) 41 T.L.R. 651; 10 Tax Cas. 73.

[7] (1928) 14 Tax Cas. 271.

[8] 1929 S.C. 664, 669; 14 Tax Cas. 645, 651.

[9] [1949] W.N. 343; [1949] 2 All E.R. 537; 31 Tax Cas. 221.

[10] [1948] A.C. 31.

[11] [1905] 2 Ch. 60.

[12] [1925] Ch. 362.

[13] [1895] 2 Ch. 501.

[14] [1905] 2 Ch. 60.

[15] [1925] Ch. 362.

[16] [1895] 2 Ch. 501.

[17] [1948] A.C. 31.

[18] (1888) 15 R. 682.

[19] [1902] A.C. 37, 41.

[20] [1937] 2 All E.R. 488; 21 Tax Cas. 137.

[21] [1952] A.C. 631.

[22] [1947] A.C. 447, 458.

J. H. Stamp following. The key to this case is that one does not approach the question whether or not the activities of this body are beneficial to the police or the public because there is not the foundation of a charity to start with, viz., any gift " limited, " appointed and assigned " by persons with a charitable intention. There is no charitable intention here. This is a fund contributed by persons for their common benefit and is right outside the statute of Elizabeth I. If 20 poor people combined to put money into a common fund to buy tea that would not be charitable; it would merely be a combination of persons for their own benefit: see *Londonderry Presbyterian Church House Trustees* v. *Inland Revenue Commissioners.*[23] Enlightened self-interest is not charity. The expressed object of this association is not charitable. What the members do is to spend money on themselves, enjoying different forms of sport, and they are furthering no object save the enjoyment of sport. The control of the Chief Constable was purely negative. In this case the door is not opened to charity at all. The same principle applies here as in *In re Hobourn Aero Components Ld.'s Air Raid Distress Fund,*[24] which is similar to this case. It was cited with approval in *Oppenheim* v. *Tobacco Securities Trust Co. Ld.*[25]

Hunter Q.C. (of the Scottish Bar), *Wilfrid Hunt* (of the English Bar) and *W. Fraser* (of the Scottish Bar) for the respondents. The only question before the House is whether the association is a charity within section 30 (3) of the Finance Act, 1921, so that it is entitled to exemption under the section. That question falls to be decided on the English law of charity incorporated into Scottish revenue law. However difficult it may be for the Scottish courts to exercise their jurisdiction in such a case, it must be exercised. The Scottish courts must base their decision on the statute of Elizabeth I and the development of the law in the case-law of England. The difficulties are technical rather than practical. The House can apply English law to the decision of this case, though it was not argued or proved in the court below.

The proper starting point is to look at the preamble to the statute of Elizabeth I, which contains (inter alia) two elements which are present in this case: (1) the maintenance of public order, and (2) the relief of taxation. It is to be noted that although there was no police force then in the modern sense,

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[23] [1946] N.I. 178, 189; 27 Tax Cas. 439, 447.

[24] [1946] Ch. 194, 201, 203.

[25] [1951] A.C. 297, 306–7, 311.

"maintenance for houses of correction" is mentioned as an element of public order. The association falls within the fourth of the categories set out by Lord Macnaghten in *Pemsel's* case [26]: "other purposes beneficial to the community."

If the association's purpose were merely to encourage sports and pastimes it would not be charitable. In *National Anti-Vivisection Society* v. *Inland Revenue Commissioners* [27] Lord Wright said that healthy sports are beneficial to the public, "but "apart from special concomitants are not generally entitled to "qualify as charitable objects": see also *In re Nottage* [28] and *Peterborough Royal Foxhound Show Society* v. *Inland Revenue Commissioners.*[29] In this case "special concomitants," set out in para. V of the special case, indicate that the association's activities are beneficial to the public in a way which the law regards as charitable. They meet by private enterprise what is in fact a public need, and unless such an organization existed through the efforts of the police themselves it would have to be financed by the public, and that renders the association charitable.

Although, where the dominant purpose of an association is to serve the interests of the members, it cannot be charitable, to say that because the members are benefited it cannot be charitable is to put the matter too high: see *Inland Revenue Commissioners* v. *Yorkshire Agricultural Society.*[30] Motive, as distinct from purpose, is neither here nor there. The important question is: What is the result?: see *Gilmour* v. *Coats.*[31]

It is not true to say that the money or resources of this association are dedicated solely to the benefit of its members. One must look for the dominant purpose: see *Royal College of Surgeons of England* v. *National Provincial Bank Ld.*[32] The test is not the source of the funds but the purpose effected. An object may be direct and yet only incidental or indirect and yet dominant: see *Peterborough Royal Foxhound Show Society* v. *Inland Revenue Commissioners.*[33] The question is: Is the association established for a charitable purpose only? In answering it, if one finds an essential benefit to the public to be the dominant object, one then asks whether the benefit is of a sort which the law regards as charitable. The questions thus are: (1) Is the essential element of public benefit present? (2) Is it the dominant object? In considering the matter here one should not restrict oneself to financial benefits. There are financial benefits to the members, but there are wider benefits to the public, and this is not just a mutual benefit society. *In re Hobourn Aero Components Ld.'s Air Raid Distress Fund*,[34] on the ground expressed by Lord Greene M.R., is not applicable to the present case.

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[26] [1891] A.C. 531, 583.

[27] [1948] A.C. 31, 41–2.

[28] [1895] 2 Ch. 649.

[29] [1936] 2 K.B. 497.

[30] [1928] 1 K.B. 611, 620, 630–1, 632–3, 636–7.

[31] [1949] A.C. 426.

[32] [1952] A.C. 631.

[33] [1936] 2 K.B. 497, 501–2.

The close connexion between the police and the association under its rules is to be emphasized. Its activities are very much police activities. Police premises are used. At the sports the police control the traffic and the spectators without charge. The association is the only means by which the police can be trained in swimming and life saving. The committees in their composition recognize the police hierarchy.

All this produces the direct public benefit of maintaining an efficient police force, since one of the recognized methods of maintaining an efficient police force is to give the members organized recreation—a thing which must also involve incidental benefit to individuals. If the association did not do this the public would have to, as in the case of the Navy, the Army and the Air Force. This purpose of promoting the efficiency of the police force falls within the spirit and intendment of the statute of Elizabeth I and is charitable. The police contribute to the maintenance of public order more obviously than the Army.

The rules of the association must be read as a whole and construed in the light of the evidence of surrounding circumstances. One may find a voluntary association with an imperfect constitution so that one must look beyond the actual written rules to find the dominant purpose. That is what must be done here to see whether the dominant purpose is public benefit or the benefit of the members. If the association had looked forward to a revenue case and asked a lawyer to draft rule 2 it might have been differently expressed, but it would be unfortunate if that should make all the difference here. It is doubtful whether the association could wind itself up, but the possibility is neither here nor there and has no bearing on the case against the respondent association.

In re Good[35] supports the association's case. On the facts it may be an extreme case but the principle stated is unassailable. It has been repeatedly applied, though whether properly applied to particular cases is another matter: see also *In re Driffill*[36] and *In re Gray.*[37] This sort of reasoning has been applied to fire brigades: *In re Wokingham Fire Brigade Trusts,*[38] another instance of bodies of a disciplined character providing services which otherwise the public would have to provide for itself.

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[34] [1946] Ch. 194, 201.

[35] [1905] 2 Ch. 60.

[36] [1950] Ch. 92, 94.

[They also referred to Tyssen on Charitable Bequests, 2nd ed., p. 114; *Institution of Civil Engineers* v. *Inland Revenue Commissioners*[39]; *Royal College of Surgeons of England* v. *National Provincial Bank Ld.,*[40] and *National Anti-Vivisection Society* v. *Inland Revenue Commissioners.*[41]]

Wilfrid Hunt following. Mutual benefit societies depending on subscriptions may be charitable. Friendly societies have been held to be so in the case of poverty. A society for the common benefit of the members may be charitable if it has some other qualification which renders it so. If the inhabitants of Canvey Island had formed a Canvey Island Protection Society to strengthen the sea walls, they alone would have benefited, but it would have been a good charitable trust. " Seabanks " are specifically referred to as an object of charity in the statute of Elizabeth I, without any qualification. There one would have a society for the common benefit of the members which was also a charity. This association is bound up with the police force of Glasgow. The subscriptions are collected through the police machinery. The control of traffic at the sports is taken over by the police free of charge, whereas for other such meetings a charge would be made. [He referred to *National Anti-Vivisection Society* v. *Inland Revenue Commissioners.*[42]]

Lord Advocate Clyde in reply. Where there is admittedly a non-charitable as well as a charitable element in an association, it will not be entitled to exemption unless it shows that the charitable element was dominant. In *Peterborough Royal Foxhound Show Society* v. *Inland Revenue Commissioners*[43] the dominant purpose was held not to be charitable despite a strong charitable flavour in the society's objects. In *Inland Revenue Commissioners* v. *Yorkshire Agricultural Society*[44] the purpose was held to be charitable on grounds set out by Atkin L.J. In this case the object is sports and pastimes, which is not a charitable purpose. By the express provision of the rules it is a society for the common benefit of the members. From surrounding circumstances an inference cannot be made that the object is not what the rules say it is. Further, the statute of Elizabeth I starts with the idea of givers and founders, whereas this is nothing but a sporting club and any public benefit is merely incidental.

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[37] [1925] Ch. 362, 366–7.
[38] [1951] Ch. 372, 376–7.
[39] [1932] 1 K.B. 149.
[40] [1952] A.C. 631, 656–7.
[41] [1948] A.C. 31, 47.
[42] [1948] A.C. 31, 64.
[43] [1936] 2 K.B. 497.
[44] [1928] 1 K.B. 611, 629–30.

Their Lordships took time for consideration.

March 9. LORD NORMAND. My Lords, the question in this appeal is whether the respondent association is a body of persons "established for charitable purposes only." If so, it is agreed that the profits of a trade, namely, the holding of annual athletic sports, carried on by them, will be exempt from income tax under Sch. D, by virtue of section 30 (1) (*c*) of the Finance Act, 1921, as amended by section 24 of the Finance Act, 1927.

[His Lordship stated the facts and continued:] The Special Commissioners, having found these facts, rejected the only contention then put forward on behalf of the Crown that, by reason of the wide nature and extent of the objects of the association, it was not a body of persons established for charitable purposes only. They were aided in arriving at this conclusion by such cases as *In re Good*[1] and *In re Gray*.[2] As I shall not have occasion to refer to these cases again I will say now that so far as they are founded on the principle that gifts exclusively for the purpose of promoting the efficiency of the armed forces are good charitable gifts, they are, in my opinion, unassailable, but that the decision that the actual gifts were of that nature is more doubtful. I would hold further that gifts or contributions exclusively for the purpose of promoting the efficiency of the police forces and the preservation of public order are by analogy charitable gifts.

The stated case came before the First Division of the Court of Session. Their Lordships did not address themselves to a discussion and decision of the question of law submitted for their opinion, "whether the City of Glasgow Police Athletic Association is, within the meaning and for the purposes of section 30 "of the Finance Act, 1921 (as amended by section 24 of the "Finance Act, 1927) a charity, namely, a body of persons "established for charitable purposes only." The Lord President pointed out[3] that *Commissioners for the Special Purposes of the Income Tax* v. *Pemsel*[4] decided that the words "charity" and "charitable" in the Income Tax Act, 1842, must be construed in their technical meaning according to English law. The words which have to be construed under the Acts now in force are the same. *Pemsel's* case [4] also disapproved of *Baird's Trustees* v. *Lord Advocate*,[5] in which Lord President Inglis had held that the words "charitable purposes" in the Act of 1842 were to be interpreted in their popular signification as meaning the relief of poverty. Plainly, *Pemsel's* case [6] laid down the rule for construing "charity" and "charitable" as one to be observed both by the courts in England and by the Court of Session. The advantage for Scottish taxpayers of this rule over the construction accepted in *Baird's Trustees* [7] is obvious and considerable. The Lord President proceeds to say that the general law of charities has progressed in England and Scotland since *Pemsel's* case [8] was decided and that there is a considerable and growing divergence. His conclusion is that the Court of Session cannot invest itself with the unique attributes of the Chancery Division or perform the functions which belong to the system of law there administered and that the difficulty in which the Court of Session finds itself, hitherto evaded, must now be faced. His solution of the problem is that the English law of charities is foreign law and a matter of fact for the Court of Session, and therefore that the only course open to him was to take the determination of the Special Commissioners as a finding of fact for the Scottish courts. With this mode of disposing of the stated case the other members of the court agreed. They professed a sense of incapacity to deal with the case in any other way.

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[1] [1905] 2 Ch. 60.
[2] [1925] Ch. 362.
[3] 1952 S.C. 102, 117.
[4] [1891] A.C. 531.

My Lords, I will not disguise that I have a certain sympathy with the Scottish judges, who feel embarrassed at having to administer as part of the law of Scotland a difficult and technical branch of English law. For I have had in the Court of Session some, though not a large, experience of this jurisdiction, and I felt the embarrassment. Nevertheless I must at once say that there has been here a failure to exercise a jurisdiction which the court had a plain duty to exercise.

My Lords, in *Pemsel's* case [8] it was decided authoritatively that it was part of the jurisdiction of the Court of Session as Court of Exchequer in Scotland to administer this branch of English law in claims for exemption by charities. Since then the Finance Act, 1925, section 19, has provided that claims for

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[4] [1891] A.C. 531.
[5] (1888) 15 R. (Ct. of Sess.) 682.
[6] [1891] A.C. 531.
[7] 15 R. (Ct. of Sess.) 682.
[8] [1891] A.C. 531.

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exemption by charities were in future to be made to the Commissioners of Inland Revenue and were to be determined by the Special Commissioners in like manner as an appeal made to them against an assessment under Schedule D, and that all the provisions of the Income Tax Acts relating to such an appeal (including the provisions relating to the statement of a case for the opinion of the High Court on a point of law) shall apply accordingly with any necessary modifications. For Scottish subjects the appeal on law is, of course, to the Court of Session (Income Tax Act, 1918, ss. 235 and 149 (3)). The Court of Session has, therefore, a statutory duty to decide any question of law that may come before it in a claim to exemption, and the law which it must administer is the English law of charity.

The necessary effect of *Pemsel's* case[8] and now also of the provisions of section 19 of the Act of 1925 is that the English law of charity has, for income tax purposes and for them alone, to be regarded as part of the law of Scotland and not as a foreign law. The practical difficulties for a Scottish lawyer are considerable, but I would not have them exaggerated. These difficulties spring mainly from the nature of charity and from the way in which the law of charity has grown up. I need not enlarge on this for it is an aspect of the English law which has been recently sufficiently commented on with special authority by Lord Simonds, as he then was, in *Gilmour* v. *Coats*[9] and in *Oppenheim* v. *Tobacco Securities Trust Co. Ld.*[10] I venture, however, to say that many of the difficulties felt by Scottish lawyers in administering this law, are scarcely less felt by English equity lawyers, and that the general Scots law of charities likewise has difficulties of its own. It has never yet, for example, been found possible to define in generally accepted terms what is the precise meaning of charity in Scottish law, and one reason is that the Scots law of charities owes nothing to the great Institutional writers, and much of it, like its counterpart in England, has been built up piecemeal by the decisions of the courts.

The duty of the Court of Session to apply the English law of charities in income tax cases has been expressly recognized in *Jackson's Trustees* v. *Inland Revenue*[11] by Lord President Clyde and Lord Sands. In that case the limits of the rule were defined. It was also recognized and applied in *Roll of Voluntary Workers Trustees* v. *Inland Revenue*.[12] Among the consequences of the

[8] [1891] A.C. 531.
[9] [1949] A.C. 426, 449.
[10] [1951] A.C. 297, 307.
[11] 1926 S.C. 579; 10 Tax Cas. 460.
[12] 1942 S.C. 47; 24 Tax Cas. 320.

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action taken by the First Division in this case is to cast some doubt on these cases and to deprive Scottish claimants of an effective right to appeal from the determination of the Commissioners.

In certain respects the jurisdiction is less embarrassing than their Lordships seem to have supposed. They are technically not bound by the decisions of the English courts in the matter of charities and it is not improper for them to discuss or criticize English decisions. The Court of Session is not reduced to the rôle of an obsequious follower of decisions either of a judge of first instance or of the Court of Appeal, though it is only good sense to pay special regard and respect to the decisions and opinions pronounced by the English courts on a branch of the law built up by English judges, and familiar to them by long training and experience.

I come now to the merits of the appeal and I unfeignedly regret that I must do so without the aid of the opinions of the learned judges of the First Division, especially as the issue, though not easy, owes none of its difficulty to technicalities of English law. The respondents' contention is that the association falls within the last category of Lord Macnaghten's classification of charities in *Pemsel's* case,[13] and that it is established for charitable purposes only. In looking for the purposes for which it is established I begin with the rules. The objects set out in rule 2, "to encourage and promote all forms of athletic sports "and general pastimes," are not charitable purposes. But it will not do to stop there. The next step is to notice that the members' subscriptions are exclusively spent on their own sports and recreations. In order to augment the fund expendable for these purposes the members carry on the trade of holding the annual sports. So far, again, there is no element of charity and the purposes are self-regarding. In *In re Hobourn Aero Components Ld.'s Air Raid Distress Fund* [14] voluntary collections from employees of the munition factories belonging to a certain company were to be used to relieve without a means test the distress suffered by the employees from air raids. It was held by Cohen J. that this was not a charity, and this decision was affirmed by the Court of Appeal.[15] Lord Greene M.R. said [16]: "The point to my mind which really puts this case beyond "reasonable doubt is the fact that a number of employees of this

[13] [1891] A.C. 531, 583.

[14] [1946] Ch. 87.

[15] [1946] Ch. 194.

[16] Ibid. 200.

"company, actuated by motives of self-help, agreed to a deduction from their wages to constitute a fund to be applied for their own benefit without any question of poverty coming into it. Such an arrangement seems to me to stamp the whole transaction as one having a personal character, money put up by a number of people, not for the general benefit, but for their own individual benefit." Morton L.J. said[17]: "Those eligible to receive benefits were not even all the employees of the particular company. They were those who chose to join in the scheme." In *Oppenheim* v. *Tobacco Securities Trust Co. Ld.*[18] Lord Simonds expressed his full agreement with all that was said by Lord Greene M.R. and Morton L.J. in *In re Hobourn Aero Components Ld.'s Air Raid Distress Fund.*[19] The case is an authority against recognizing as a charity a body that merely applies the subscriptions of its members to their own recreation. It does not, of course, prejudice the question whether in certain circumstances the benefit of members is not subsidiary and incidental to another and charitable purpose.

It would be unjust to the respondent association to represent it as having no purpose beyond the recreation and amusement of the individual subscribers constituting its membership. No one can read the rules without perceiving that the association was regarded as having an official importance and a public aspect. And in order to ascertain what the purposes of an association are, the court is not limited to consideration of its rules or its constituent documents. They are very important, and it would be difficult for an association to say that something declared in its rules to be its object was not one of its purposes. But it is quite in order for the association to prove by parol evidence that it had other purposes beyond that expressly set down in the rules. The Special Commissioners had evidence before them which entitled them to find that, among its purposes, were the encouragement of recruiting, the improvement of the efficiency of the force, and the public advantage. This is a purpose which the Special Commissioners were entitled to hold in law to be a public charitable purpose. But there remains the non-charitable purpose of providing recreation to the members. The question is whether this non-charitable purpose is incidental to the public charitable purpose. If not, it cannot be said that the association was a body established for charitable purposes only. This is not a matter of the motive of the members of the association or of the high police officials who took a part in furthering the association, though there is a natural probability that their motives agree with the purposes of the association. The question is what are the purposes for which the association is established, as shown by the rules, its activities and its relation to the police force and the public. And what the respondents must show, in the circumstances of this case, is that so viewed objectively the association is established for a public purpose, and that the private benefits to members are the unsought consequences of the pursuit of the public purpose, and can therefore be disregarded as incidental. That is a view which I cannot take. The private benefits to members are essential. The recreation of the members is an end in itself, and without its attainment the public purpose would never come into view. If the result of establishing the association had been that the members had, instead of being interested, found themselves involved in wearisome and lifeless activities, their efficiency would have suffered, the membership would have fallen off, and there would have been public detriment instead of public benefit. The private advantage of members is a purpose for which the association is established and it therefore cannot be said that this is an association established for a public charitable purpose only. In *Inland Revenue Commissioners* v. *Yorkshire Agricultural Society*[20] Atkin L.J. considered the problem of societies having more than one purpose. He says: "First of all "it is said: No, this society was in fact formed for the purpose "of giving benefit to its members; it is nothing but a club for "the mutual advantage of the members of the club. If that "were so I agree that the claim of the society would fail, both "because it could not be said that the society was established for "a charitable purpose, and because it certainly could not be said "that it was established for a charitable purpose only. There "can be no doubt that a society formed for the purpose merely "of benefiting its own members, though it may be to the public "advantage that its members should be benefited by being "educated or having their aesthetic tastes improved or whatever "the object may be, would not be for a charitable purpose, and "if it were a substantial part of the object that it should benefit "its members I should think that it would not be established "for a charitable purpose only. But, on the other hand, if the "benefit given to its members is only given to them with a view "of giving encouragement and carrying out the main purpose

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[17] Ibid. 209.

[18] [1951] A.C. 297, 307.

[19] [1946] Ch. 194.

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[20] [1928] 1 K.B. 611, 631.

"which is a charitable purpose, then I think the mere fact that "the members are benefited in the course of promoting the "charitable purpose would not prevent the society being established for charitable purposes only." In principle, therefore, if an association has two purposes, one charitable and the other not, and if the two purposes are such and so related that the non-charitable purpose cannot be regarded as incidental to the other, the association is not a body established for charitable purposes only.

I would allow the appeal.

LORD OAKSEY. My Lords, I agree with what has been said by the noble Lord on the woolsack as to the function of the Court of Session in tax cases.

On the merits of the appeal I have had much difficulty and have come to the conclusion that the appeal ought to be dismissed.

In my opinion, the efficiency of a police force is largely dependent upon the activity and physical fitness of its members, and athletic and other sports ought to be and are encouraged by those responsible for such forces. It is clear, too, that the efficiency of the police is a matter of public importance which falls within the class of charitable purposes to which the exemption in section 30 of the Income Tax Act, 1918, applies. The question, then, is whether the City of Glasgow Police Athletic Association is a body of persons established for public charitable purposes only.

Now, it is clear that "purposes" are not the same as "results" and there is ample authority that a body of persons or trust may be established for charitable purposes only although its establishment has results which are not charitable, for instance, the benefits derived by the officers in the cases of *In re Good*,[21] and *In re Gray*,[22] and by the surgeons in the *Royal College of Surgeons of England* v. *National Provincial Bank Ld.*[23] As Lord Macnaghten said in *Inland Revenue Commissioners* v. *Forrest*[24]: "It cannot I think be doubted that the institution "has raised the standard of the profession, and that to a civil "engineer it is of advantage and probably of pecuniary advantage to be a member. But is that result the purpose of the "society, or is it an incidental, though an important and perhaps

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[21] [1905] 2 Ch. 60.

[22] [1925] Ch. 362.

[23] [1952] A.C. 631.

[24] (1890) 15 App.Cas. 334, 354.

"a necessary, consequence of the way in which the institution "does its work in the pursuit of science?"

The purposes for which a body of persons is established can only be discovered from the constitutional document, if there is one, which establishes the body. In the present case, in my opinion, the constitution and general rules of the respondents indicate that the purpose of the body was the efficiency of the force. There can, in my opinion, have been no other reason for rule 23 which makes every resolution and decision subject to the approval of the Chief Constable. The Chief Constable is only concerned with the amusement of his men for the purpose of having a contented and efficient force. All the rules are framed to meet the needs of a disciplined force. It is, in my opinion, impossible to imagine that such rules would have been drawn up by anyone or by any body of men who were not intending to promote discipline. Decisions are not confided to the majority or even to an unanimous vote, but to the Chief Constable. It is true that no one need belong to the association, but that is equally consistent with it being the view of the Chief Constable or other authority who devised the scheme, which was originally compulsory, that a voluntary scheme was from its nature more likely to create keenness and esprit de corps which have the necessary result of efficiency. The matters to which I have referred are all found as facts by the Special Commissioners in para. II (10) and (13) and para. V of the special case.

It has been argued for the Crown that the association is nothing but a club or mutual society for the benefit of the subscribers, but, in my opinion, the Chief Constable's veto is absolutely inconsistent with any such idea. It is true that the money subscribed comes from the members and is used for their immediate benefit, and it is argued that this negatives the idea of any public charitable purpose, but, in my opinion, it is not any more a necessary inference that the purpose of the members was their own enjoyment than that their purpose was their own efficiency. The purposes of a body of persons can only be inferred from the facts as to their association as a body; some may have one purpose, others another; but when they all submit themselves to the dictation of their commanding officer it appears to me that the reasonable inference is that they are prepared to subordinate their private purposes to his and that his purpose must be inferred to be the efficiency of the force and not its amusement.

LORD MORTON OF HENRYTON. My Lords, the only question arising for decision on this appeal is whether the respondent association is a "body of persons . . . established for charitable "purposes only" within the meaning of section 30 (3) of the Finance Act, 1921. If the association is such a body, it is not disputed that the profit of £1,214 resulting from its annual amateur sports meeting, held during the year ending September 30, 1950, is exempted from income tax by section 30 (1) (*c*) of the Finance Act, 1921, as amended by section 24 of the Finance Act, 1927.

The facts as to the establishment of the association are set out in para. II (1) of the case stated as follows: "Prior to "1938 there were various clubs connected with the City of "Glasgow police. In February, 1938, these clubs were merged "in the association, which was established at that date with "the purpose of co-ordinating the various athletic and sporting "activities of the members of the police force." Starting from this point, I have carefully considered the constitution and general rules of the association, and the facts as to its activities which are set out in the case stated, and I am quite unable to hold that this body of persons is established for charitable purposes only.

Rule 2 provides that: "The objects of the association shall "be to encourage and promote all forms of athletic sports and "general pastimes." It was accepted by the Special Commissioners, and it is not disputed by the respondent association, that these objects, stated in such general terms, are not objects which the law regards as charitable. It is rightly said, however, that the constitution and rules must be read as a whole and construed in the light of such evidence of surrounding circumstances as may be admissible. So reading them and so construing them I arrive at the conclusion that the purpose for which the association is established is to provide for its members and their friends facilities for taking part in athletic sports and general pastimes, both out-door and in-door. I cannot detect in this purpose any element of charity. The members pay their subscriptions and get certain benefits in return; they make a profit by running the annual amateur sports meeting already mentioned, and that profit is applied to carrying out the purpose which I have just stated. So far, the association would not appear to be any more a charity than is any other athletic or social association or club established for the like purpose. The association does not, in my view, fit into any of the four "principal divisions" mentioned by Lord

Macnaghten in *Pemsel's* case,[25] and the purpose just stated is far indeed from the "spirit and intendment" of the preamble to the statute 43 Elizabeth I, c. 4.

Counsel for the respondent association rely strongly upon the facts found in para. V of the special case and especially upon sub-paragraph (*f*), which is as follows: "(*f*) The existence "and activities of the respondent association—(i) played an "important part in the maintenance of physical fitness, health, "morale and esprit de corps within the force; (ii) attracted "recruits to the force; (iii) helped to maintain the strength and "efficiency of the force by conducing to a contented force, "keeping members happy in their work and inducing them to "continue in the force, rather than leave it; (iv) conduced to "the public order by promoting good relations between the force "and the general public; (v) increased the efficiency of the force "generally, and thereby directly benefited the public." They contend that the achievement of the results just stated is the purpose for which the association is established, and that this is a charitable purpose. I do not doubt, my Lords, that a gift made for the sole purpose of increasing the efficiency of the police force would be a charitable gift, but the task before your Lordships is first to determine the purpose or purposes for which the association is established and then to determine whether the sole purpose, or all the purposes, are charitable. In my view, the purpose for which the association is established, within the meaning of section 30 (3) of the Finance Act, 1921, is the non-charitable purpose which I have already stated and the achievement of the results set out in para. V is simply a consequence which will follow if the purpose for which the association is established is carried out successfully and efficiently.

Even if I were satisfied that there exists some other purpose for which the association was or is established, for instance, the purpose of maintaining the strength and efficiency of the police force, I should find it impossible to say that the *sole* purpose of the association is a purpose which is nowhere even mentioned in the constitution and general rules, and that the purpose which emerges so clearly in the rules, and upon which the income of the association appears to have been expended ever since it came into existence, is either non-existent or merely incidental.

Observations have been made by my noble and learned friend on the woolsack as to the course which this case took in the First

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[25] [1891] A.C. 531, 583.

Division of the Court of Session. I agree with these observations and do not desire to add to them. I agree also with my noble and learned friend's comments upon the cases of *In re Good*[26] *In re Gray*,[27] and *In re Hobourn Aero Components Ld.'s Air Raid Distress Fund.*[28]

I would allow the appeal.

LORD REID. My Lords, the respondents claim that they are entitled to exemption from income tax under section 30 of the Finance Act, 1921, as amended by section 24 of the Finance Act, 1927. It is admitted that if they are a "body of persons . . . "established for charitable purposes only" they are entitled to exemption, the other requirements of the section being satisfied.

The respondent association was formed in 1938, apparently under official guidance. From then until 1947 membership of the association was a condition of service for all new entrants to the Glasgow police force. Compulsory membership was abolished in 1947, but it appears that all new entrants since that date have in fact become members. Membership is restricted to officers and ex-officers of the force: only a few ex-officers remain members and they give valuable service in coaching other members. Under the rules the management of the association is largely in the hands of senior officers of the force, and all resolutions passed at meetings of the association are subject to the approval of the Chief Constable.

The objects of the association, set out in rule 2, are to encourage and promote all forms of athletic sports and general pastimes, and later rules show that this means to provide facilities for the members to take part in those activities and to encourage them to do so. The Special Commissioners have found that the association is regarded as an essential part of the police organization, that it plays an important part in the maintenance of health, morale and esprit de corps within the police force, that it attracts recruits to the force and that it helps to induce members of the force to continue in the force rather than leave it. Those findings amply justify the conclusion that the existence and activities of the association increase the efficiency of the force generally and thereby directly benefit the public.

I do not doubt that the purpose of increasing or maintaining the efficiency of a police force is a charitable purpose within the

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[26] [1905] 2 Ch. 60.

[27] [1925] Ch. 362.

[28] [1946] Ch. 87, 194.

Lord Reid.

technical meaning of those words in English law. It appears to me to be well established that the purpose of increasing the efficiency of the army or a part of it is a charitable purpose. It may be that in some cases the facts hardly justified the conclusion that this was the purpose of the gift in question, but that does not affect the principle. I can see no valid distinction between the importance or character of the public interest of maintaining the efficiency of the army and that of maintaining the efficiency of the police.

But it is not enough that one of the purposes of a body of persons is charitable: the Act requires that it must be established for charitable purposes only. This does not mean that the sole effect of the activities of the body must be to promote charitable purposes, but it does mean that that must be its predominant object and that any benefits to its individual members of a non-charitable character which result from its activities must be of a subsidiary or incidental character.

It was argued that this association could not be regarded as established for charitable purposes because its revenue is all spent on activities in which its members alone take part. I am not satisfied that in every case that would be enough by itself to prevent the body from being held to be established for charitable purposes only, and I prefer to base my opinion on the facts of this case.

The peculiarity of this case is that the same activities have a double result. They are beneficial to the public by increasing the efficiency of the force and they are beneficial to the members themselves in affording to them recreation and enjoyment: and all the relevant facts appear to me to indicate that the purpose was to produce this double result. It may well be that considerations of public interest were the primary cause of the association being established and maintained: but I think that it is clear that all or most of the activities of the association are designed in the first place to confer benefits on its members by affording to them recreation and enjoyment. It is only as a result of these benefits that the purpose of increasing the efficiency of the force is achieved. In some cases where the end is a charitable purpose the fact that the means to the end confer non-charitable benefits may not matter; but in the present case I have come to the conclusion that conferring such benefits on its members bulks so largely in the purposes and activities of this association that it cannot properly be said to be established for charitable purposes only. I therefore agree that the appeal should be allowed.

There is one other matter that I must notice. The First Division have held that they are not competent to decide what is a charitable purpose because that is purely a question of English law. In this I think that they were mistaken. It has commonly been accepted since *Pemsel's* case[29] that the words charity and charitable in income tax legislation must be interpreted according to English law, but I do not think that that is a full or accurate statement of the position. In my judgment holding that those words must be interpreted according to English law must mean that it is to be held that Parliament enacted that on that matter the law of England should also become the law of Scotland, and it must follow that Parliament must be held to have placed on the courts of Scotland the duty of administering what was formerly only the law of England but what has been made by Act of Parliament the law of both countries. It is true that this form of legislation by reference puts the Scottish courts in some difficulty, because it may not always be easy for them to discover what are the principles to be applied in a particular case—incidentally that is not always easy even for an English court. But whatever the practical difficulties may be, and whether or not those difficulties were ever appreciated by Parliament or by this House in determining what Parliament must be held to have enacted, the fact remains that Parliament must be held to have required the Scottish courts to surmount those difficulties, and the duty so placed on the Scottish courts can now only be removed by legislation.

LORD COHEN. My Lords, the question at issue in these proceedings is whether the respondent association is a " body of " persons . . . established for charitable purposes only " and is therefore entitled to exemption under section 30 of the Finance Act, 1921, as amended by section 24 of the Finance Act, 1927. The Special Commissioners answered this question in favour of the association but stated a case at the instance of the appellants, the question for the decision of the court being framed as follows:—" The question of law for the opinion of the court is " whether the City of Glasgow Police Athletic Association is, " within the meaning and for the purposes of section 30 of the " Finance Act, 1921 (as amended by section 24 of the Finance

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[29] [1891] A.C. 531.

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1953

INLAND REVENUE COMMISSIONERS v. CITY OF GLASGOW POLICE ATHLETIC ASSOCIATION.

Lord Cohen.

"Act, 1927), a charity, namely a body of persons established for "charitable purposes only."

The First Division of the Court of Session answered this question in the affirmative. They arrived at their conclusion by treating the question as one of fact, on the ground that your Lordships' House had held in *Pemsel's* case [30] that the question whether a body of persons was a charity for the purposes of the Income Tax Acts fell to be determined according to English law and that English law in a Scottish court was a question of fact. Mr. Hunter for the association did not attempt to support that line of reasoning, and I have nothing to add to what has been said by my noble and learned friend on the woolsack on this aspect of the question. I turn, therefore, to the question stated by the Special Commissioners.

They based their conclusion in favour of the respondent association in substance on the decisions in the Chancery Division in the cases of *In re Good* [31] and *In re Gray*.[32] In both those cases the question at issue was the validity of a gift contained in the will of a testator, the gift in the former case being of a library and plate for an officers' mess and in the latter of a fund for the promotion of sport in a regiment. The ratio decidendi of the two cases is conveniently stated by Farwell J. in *In re Good* [33] in the passage cited by the Special Commissioners, which reads as follows:—"I have come to the conclusion that this is a good "charitable gift on the first ground—namely, that it is a direct "public benefit to increase the efficiency of the army, in which "the public is interested, not only financially, but also for the "safety and protection of the country." The Commissioners then observed that the increase of the efficiency of police forces appeared to them analogous to the increase of the efficiency of the army, and on this ground decided in favour of the association. They omitted, however, to notice that they were not concerned with the question whether a gift for the promotion of efficiency in the police force was a valid charitable gift but with the different question whether the respondent association was formed for charitable purposes only.

This question has to be determined upon the construction of the constitution and rules of the association and of the findings of fact contained in the stated case, but before I turn to them it will be convenient to refer briefly to some of the authorities

[30] Ibid. 583.

[31] [1905] 2 Ch. 60.

[32] [1925] Ch. 362.

[33] [1905] 2 Ch. 60, 66.

to which your Lordships' attention was directed in the course of the argument. From them certain principles appear to be settled.

(1) If the main purpose of the body of persons is charitable and the only elements in its constitution and operations which are non-charitable are merely incidental to that main purpose, that body of persons is a charity notwithstanding the presence of those elements—*Royal College of Surgeons of England* v. *National Provincial Bank Ld.*[34]

(2) If, however, a non-charitable object is itself one of the purposes of the body of persons and is not merely incidental to the charitable purpose, the body of persons is not a body of persons formed for charitable purposes only within the meaning of the Income Tax Acts—*Oxford Group* v. *Inland Revenue Commissioners.*[35]

(3) If a substantial part of the objects of the body of persons is to benefit its own members, the body of persons is not established for charitable purposes only—*Inland Revenue Commissioners* v. *Yorkshire Agricultural Society.*[36] The distinction between this class of case and that contemplated in the first principle I have stated is aptly pointed out by Atkin L.J. in the case last cited, when he says[37]: "There can be no doubt that a "society formed for the purpose merely of benefiting its own "members, though it may be to the public advantage that its "members should be benefited by being educated or having their "aesthetic tastes improved or whatever the object may be, "would not be for a charitable purpose, and if it were a sub"stantial part of the object that it should benefit its members "I should think that it would not be established for a charitable "purpose only. But, on the other hand, if the benefit given to "its members is only given to them with a view of giving "encouragement and carrying out the main purpose which is a "charitable purpose, then I think the mere fact that the "members are benefited in the course of promoting the charitable "purpose would not prevent the society being established for "charitable purposes only."

With these principles in mind I turn to the constitution and rules of the respondent association.

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[34] [1952] A.C. 631.

[35] [1949] W.N. 343; [1949] 2 All E.R. 537; 31 Tax Cas. 221.

[36] [1928] 1 K.B. 611.

[37] Ibid. 631.

Rule 2 declares the objects of the association to be "to "encourage and promote all forms of athletic sports and general "pastimes." It was common ground between the parties that if this object had to be considered in vacuo it would not be a good charitable purpose, but Mr. Hunter argued, and I think, rightly, that, read in its context, it must be limited to the promotion of sports and pastimes among the Glasgow police; not, however, as I read the document, all the Glasgow police, but only such of them and such ex-members of the Glasgow police as become and remain members of the association. So limited, said the Lord Advocate and Mr. Stamp, for the appellants, the association is merely a private club and the observations of Lord Greene M.R. in *In re Hobourn Aero Components Ld.'s Air Raid Distress Fund* [38] were in point. In that case Lord Greene,[39] after citing a passage from Tudor on Charities, 5th ed., p. 18, said the particular association of persons with which the court was there concerned could properly be described as a mutual benefit society, which could not be charitable unless poverty is an essential qualification for participation in the benefits. There is no element of poverty to be found in the present case. Therefore, said the Lord Advocate, the respondent association is stamped with the character of a private trust.

Mr. Hunter and Mr. Hunt did not dispute the correctness of that decision, but argued that in the present case the purpose of the association was to maintain the strength and the efficiency of the Glasgow police force and the benefits to the membership of the association were merely incidental to that purpose.

Mr. Hunter relied on the findings of the commissioners as expressed in para. V of the case stated as establishing the correctness of this contention. He relied also on the following rules:—Rule 3 giving the superior officers of that force strong representation on the executive committee and the divisional committees; rule 10 providing for deduction of serving members' subscriptions from their pay; and above all rule 23 giving the chief constable a power of veto on all resolutions and decisions passed at meetings of the association. He referred also to the finding that the sports meetings of the association received specially favourable treatment in that no charge was made for the services of the police in connexion therewith. It is, I think, a fair inference from these matters and from other evidence that was before the commissioners that the association was regarded by the authorities as an essential part of the police organization and as playing an important part in the maintenance of health, morale, and esprit de corps in the police force: but the achievement of this end was more the result of the operations of the association than an achievement of its purpose, and I am unable to draw from the evidence the conclusion that the benefits to the members were given with a view *only* to giving encouragement to the maintenance of the strength and efficiency of the Glasgow police force. These benefits were and could be given to the members and to no one else. Reading the case stated and the documents annexed thereto I am forced to the conclusion that the conferment of those benefits was a substantial part of the objects of the association. In my opinion, therefore, the association cannot be said to have been established for a charitable purpose only. I agree that the appeal should be allowed.

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[38] [1946] Ch. 194.

[39] Ibid. 203–4.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue; Wedlake, Letts & Birds for A. & W. M. Urquhart, S.S.C., Edinburgh, and Walker & Orr, Writers, Glasgow.*

J. C.*
1953
Mar. 3;
Apr. 21.

MAHUMARAKALAGE EDWARD ANDREW COORAY . . . . APPELLANT;

AND

THE QUEEN . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF CRIMINAL APPEAL OF CEYLON.

Ceylon—Criminal law—Criminal breach of trust as an agent—No agency business—Substituted conviction and sentence—Penal Code of Ceylon, R.S. 1938, *c.* 15, *ss.* 389, 392.

By section 392 of the Penal Code of Ceylon: "Whoever, being "in any manner entrusted with property, or with any dominion "over property, . . . in the way of his business as a banker, "merchant, factor, broker, attorney, or agent, commits criminal "breach of trust in respect of that property, shall be punished" as provided in the section.

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* *Present*: Earl Jowitt, Lord Porter, Lord Tucker, Lord Asquith of Bishopstone and Mr. L. M. D. de Silva.

J. C.
1953

MAHUMARAKALAGE EDWARD ANDREW COORAY v. THE QUEEN.

Before an accused person can be convicted of criminal breach of trust as an agent contrary to section 392 it must be established that he is a person who carries on an agency business—not merely acts in a particular transaction as a casual agent—and that the offence charged was committed by him in the way of his business as such agent.

Reg. v. *Portugal* (1885) 16 Q.B.D. 487; 2 T.L.R. 14 applied.

Where the appellant, who had been convicted of criminal breach of trust as an agent contrary to section 392, succeeded in his appeal to the Privy Council on the ground that he was not carrying on the business of an agent, but he had, however, plainly been guilty of a criminal breach of trust under section 389 of the Penal Code of which the jury could have found him guilty in conformity with section 183 of the Criminal Procedure Code, and in respect of which the Court of Criminal Appeal in Ceylon could have substituted a verdict of guilty under section 389, the Board discharged the conviction under section 392 and substituted for it a conviction under section 389 and passed sentence thereon.

APPEAL (No. 38 of 1952), by special leave, from a judgment of the Court of Criminal Appeal of Ceylon (Nagalingam, Gratiaen and de Silva JJ.) (July 24, 1951) which dismissed an appeal by the appellant from his conviction in the Supreme Court of Ceylon (Gunasekara J. and a jury) (October 16, 1950). The conviction was for criminal breach of trust as an agent contrary to section 392 of the Ceylon Penal Code, and resulted in a sentence of five years' rigorous imprisonment.

The following facts are taken from the judgment of the Judicial Committee: After a previous trial, the circumstances of which were now irrelevant, the appellant was retried on an indictment which, after amendment, charged him with having committed criminal breach of trust between May 1, 1947, and April 30, 1948, in respect of a sum of Rs. 155,576·93, entrusted to him by the managers of the Moratuwa and Piliyandale Co-operative Wholesale Depôts of the Salpiti Korale Stores Societies Union Ld. in the way of his business as an agent, to be deposited to the credit of the same Union at the Colombo Co-operative Central Bank and thereby committed an offence punishable under section 392 of the Penal Code.

It was established in evidence that the appellant was the president of the Salpiti Korale Union, a body which supplied goods to retail stores of the Union through wholesale depôts. The method by which the business was carried on was that the Colombo Co-operative Central Bank advanced moneys to member business societies to enable them to buy their stocks. Those advances were repaid weekly and, except in the case of small sums, should have been so paid by money orders and cheques and not in the shape of cash. The Central Bank in its turn paid in the money orders, cheques and any cash which might have been received in that firm to its account with the Bank of Ceylon.

The Union supplied its member societies through three depôts, viz., Moratuwa, Piliyandale and Polgasovita. In addition to his presidency of the Union the appellant was president of the committee which controlled the depôt at Moratuwa and vice-president of the Co-operative Central Bank. No question now arose as to the depôt at Piliyandale, but it appeared that the appellant secured the appointment of a certain Ranatunga to be manager of the Moratuwa depôt. Through him as manager payments of sums due from that depôt had to be made to and deposited promptly with the Co-operative Central Bank.

The appellant appeared to have instructed Ranatunga, instead of following out the prescribed routine, to collect large sums from the retail stores in cash and hand them over to him to be transmitted to the bank. Ranatunga acted on those instructions and transferred the cash which he had collected to the appellant, who, instead of paying it over, appropriated the cash and substituted for it his own cheques for the amount due.

All cheques received by the Co-operative Central Bank should have been immediately sent to the Bank of Ceylon for collection. The appellant, however, as vice-president of the Central Bank, ensured that in many instances his cheques were not sent forward for collection, with the result that when ultimately his activities were discovered some 35 cheques had not been presented. Those cheques were some of those which the appellant had substituted for the cash which he had received from Ranatunga, and it was for misappropriation of Rs. 57,500, being part of that cash, that the appellant was ultimately convicted for criminal breach of trust as an agent.

The relevant provisions of the Ceylon Penal Code are set out in the judgment of the Board.

1953. March 2, 3. *Sir Frank Soskice Q.C.*, *Dingle Foot* and *Carl Jayasinghe* for the appellant. The appeal raises a short point of construction on section 392 of the Penal Code. The issue is whether the appellant, who was not a professional agent and did not purport to act as such, could have committed the offence created by that section. It is contended, first, that the word "agent" in section 392 is governed by the expression "in the

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"way of his business" just as much as are the words "banker, "merchant," etc., so that the agent contemplated by section 392 must be a person whose business, or part of whose business, it is to be an agent. Here, if the appellant was an agent, he acted as a casual agent. By a majority of two to one the Court of Criminal Appeal in Ceylon held, it is submitted wrongly, that the word "agent" in the section was not limited by the preceding words and covered any kind of agent acting for any principal. They declined to follow the decision of the English Divisional Court in *Reg.* v. *Portugal*[1] and of the English Court of Crown Cases Reserved in *Reg.* v. *Kane*.[2] In those two cases the English courts construed section 75 of the Larceny Act, 1861, now repealed, which was a section in similar terms to that now in question and which provided that "Whosoever, having been "intrusted either solely, or jointly with any other person, as a "banker, merchant, broker, attorney, or other agent," etc., and it was held that[3] "section 75 is limited to a class, and does not "apply to everyone who may happen to be intrusted as prescribed "by the section, but only to the class of persons therein pointed "out." The court below in the present case held, it is again submitted wrongly, that the English authorities could be distinguished from this case on the ground that in section 392 the words "or agent" had been substituted for the words "or other "agent" in the English statute. In *Reg.* v. *Prince*[4] the words in question were "or agent or agents of any description whatso-"ever," and the result and reasoning were the same as in the *Portugal* case.[5] "Agent" in section 392 is an agent of whom it can be validly predicated that he is carrying on business as an agent: on the plain meaning of the words one is constrained to adopt that interpretation. All that was decided in *Lowther* v. *Harris*[6] was that the man could be a factor although he had only one principal: "the first question is whether Prior was a mercan-"tile agent—that is, an agent doing business in buying or selling, "or both, having in the customary course of his business such "authority to sell goods."[7] Importance is attached to that passage. *Weiner* v. *Harris*[8] again shows that a person is not a factor, within the meaning of the Factors Act, unless he is a person carrying on some business as such; that case does not carry the matter much further. An "attorney" is a law agent in the general sense; one who has some sort of business: Shorter Oxford Dictionary.

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[1] (1885) 16 Q.B.D. 487, 490.
[2] [1901] 1 Q.B. 472, 475.
[3] 16 Q.B.D. 490.
[4] (1827) 2 C. & P. 517.
[5] 16 Q.B.D. 487.
[6] [1927] 1 K.B. 393.
[7] Ibid. 398.
[8] [1910] 1 K.B. 285, 291.

If the first submission does not succeed, it is contended, secondly, that the word "agent" must be read as ejusdem generis with the words "banker, merchant, factor, broker," and "attorney," and in this connexion refers only to a professional agent who commits a criminal breach of trust in the way of his business as such agent. The previous types of activities described are all recognized callings. Taken in that sense, agent must mean a person carrying on some recognized avocation. The relevant ejusdem generis rule is stated in Maxwell on the Interpretation of Statutes, 9th ed., p. 336; it applies precisely to this case. The first point is the appellant's sheet anchor; this ejusdem generis point is merely subsidiary.

If the Board is in favour of the appellant, the question arises whether it will substitute a conviction under section 389 of the Penal Code, so that if the appellant succeeds in this appeal the minimum he stands to gain is two years' remission of his sentence. The Board may either convict on the three year charge under section 389, or send the case back. The appellant has already been severely punished—he has had this case hanging over him for nearly four years, and he has been in prison for 207 days.

Sir Hartley Shawcross Q.C., *Frank Gahan Q.C.* and *Walter Jayawardene* for the Crown. In construing the statutory law of a country regard must be had to the legal nomenclature of that country, and under the Powers of Attorney Ordinance, c. 104 of the 1938 Rev. of the Laws of Ceylon, an attorney is a person who stands in the place of another—as agent for another. The argument that in order to be caught by section 392 the custodian must have a general business of agency completely breaks down on "attorney," and, if it does, there is no indication in respect of any of the other classes. "In the way of his business" means only as an agent: was he qua agent entrusted with the property? The statement in Halsbury, Vol. 1, p. 195, para. 346, is adopted as part of this argument; it is that kind of agent which is contemplated by section 392. In construing a Ceylon statute one cannot speculate on the history of earlier legislation in other countries; Ceylon inherited a different code—Roman-Dutch law.

The appellant held four offices; he was president of the Union; president of the committee which controlled the depôt with whose moneys this charge was concerned; representative of the Union on the board of the bank to which these moneys had to go; and vice-president of the bank. As such, it is submitted that it was

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his business as the agent of the Union, as the agent of the depôt, and also as the agent of anyone like the manager of the depôt, who being himself an alter ego in that respect of the Union, entrusted the moneys to the appellant as his business superior. That was what the appellant was, the business superior of the manager of the depôt, who being otherwise under a duty to transmit these moneys to the bank, on the directions of his business superior handed them to the appellant to act as his agent and as agent of the Union to take the moneys to the bank. He could act as agent in respect of one transaction: *Budberg* v. *Jerwood.*[9] It cannot be said that the manager of the depôt entrusted these moneys to the appellant because he was a friend; he did so because the appellant was president of the Union. *Lloyds Bank Ld.* v. *Bank of America National Trust and Savings Association*[10] is the clearest authority for the view that the appellant, who had been acting as a conduit pipe between the depôt and the bank for at least a year, was conducting as a business a business of agency. That case was affirmed on appeal. The above two cases make it clear that a person can be a mercantile agent although in fact he only acts in transactions for a particular principal and has no general business. The true view is the common-sense view that the appellant as president of the Union and as president of the committee controlling the depôt constituted himself the agent of the Union to take moneys from the depôt to the bank, and it was in the truest possible sense that he was an agent and an agent in a business sense. The word "agent," being used without qualification, refers to all agents whether professional or otherwise, and section 392 applies to criminal breach of trust committed by anyone acting in the capacity of an agent.

The argument on the ejusdem generis point really adds nothing to the case; it is a difficult rule to apply to this case unless a limited meaning is given to the word "attorney." It is not necessary to say that the *Portugal* case[11] was wrongly decided; the language here is not the same. The jury could have convicted under section 389 of the Penal Code, and if the conviction under section 392 cannot stand the Board can convict under section 389 or send the matter back for the appropriate sentence.

Sir Frank Soskice Q.C. in reply. "Attorney" means in the broad sense a person who acts on behalf of another, generally in a legal relationship. It was held in *Trimble* v. *Hill*[12] that "where "a colonial legislature has passed an Act in the same terms as "an Imperial statute, and the latter has been authoritatively "construed by a Court of Appeal in England, such construction "should be adopted by the courts of the colony." The principle enables me to say that the Penal Code was sufficiently close in its context to the Larceny Act of 1861 to entitle me to say that the same interpretation should be given to the relevant words as was given to the English statute in the *Portugal* case[13] and in *Kane's* case.[14] "Attorney" as used in the English Act and, it is submitted, as used in the Ceylon Code, is used in its ordinary sense, and is a term in respect of which it is possible to predicate the carrying on of a business. The words "in the way of his "business as an agent" must be read together, and they connote a person who has a business as an agent and the property is entrusted to him in the way of that business. There is no comma between "business" and "as." Business is the process or undertaking which is engaged upon for the purpose of earning profits by legal means; can it possibly be said that a series of criminal acts would come within what one would regard as "business." The mere fact that the appellant is the holder of an office does not give rise to a presumption that he is carrying on a business. In view of the facts it cannot possibly be said that this appellant was carrying on a business as an agent. Lastly, this is a penal statute, and in the case of two rival interpretations should be construed in such a way as to favour the subject where possible.

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[9] (1934) 51 T.L.R. 99.

[10] [1937] 2 K.B. 631, 638–9.

[11] 16 Q.B.D. 487.

March 3. EARL JOWITT announced that their Lordships would humbly advise Her Majesty to allow the appeal, discharge the conviction under section 392 and substitute for it a conviction under section 389 of the Penal Code, and in respect of that offence the appellant must serve a sentence of three years' imprisonment less the period of time during which he had already been imprisoned under the conviction appealed from. Their Lordships' reasons would be delivered later.

April 21. The reasons of their Lordships were delivered by LORD PORTER, who stated the facts set out above and continued: In these circumstances their Lordships have first to determine

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[12] (1879) 5 App.Cas. 342.

[13] 16 Q.B.D. 487.

[14] [1901] 1 Q.B. 472.

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whether the facts disclosed constituted a criminal breach of trust as agent, and secondly, if not, whether there can and should be substituted a conviction for some other offence.

Having regard to the wide field over which the argument ranged, their Lordships think it desirable to set out fully the provisions of the Penal Code of Ceylon dealing with criminal breach of trust. They are as follows:—

PENAL CODE.

"OF CRIMINAL BREACH OF TRUST."

Sections:

"388. Whoever, being in any manner entrusted with property, "or with any dominion over property, dishonestly misappropriates "or converts to his own use that property, or dishonestly uses or "disposes of that property in violation of any direction of law "prescribing the mode in which such trust is to be discharged, "or of any legal contract, express or implied, which he has made "touching the discharge of such trust, or wilfully suffers any "other person so to do, commits 'criminal breach of trust.'

"389. Whoever commits criminal breach of trust shall be "punished with imprisonment of either description for a term "which may extend to three years, or with fine, or with both.

"390. Whoever, being entrusted with property as a carrier, "wharfinger, or warehouse-keeper, commits criminal breach of "trust in respect of such property, shall be punished with "imprisonment of either description for a term which may "extend to seven years, and shall also be liable to fine.

"391. Whoever, being a clerk or servant or employed as a "clerk or servant, and being in any manner entrusted in such "capacity with property, or with any dominion over property, "commits criminal breach of trust in respect of that property, "shall be punished with imprisonment of either description for "a term which may extend to seven years, and shall also be "liable to fine.

"392. Whoever, being in any manner entrusted with property, "or with any dominion over property, in his capacity of a public "servant or in the way of his business as a banker, merchant, "factor, broker, attorney, or agent, commits criminal breach of "trust in respect of that property, shall be punished with "imprisonment of either description for a term which may "extend to ten years, and shall also be liable to fine.

"392A. Whoever, being entrusted with or having the dominion "of any money in his capacity as a public servant, fails forthwith to pay over or produce when required to do so by the "head of his department or by the Chief Secretary, Auditor-"General, Assistant Auditor-General, or any officer specially "appointed by the Governor to examine the accounts of his "department, any money or balance of any money shown in the "books or accounts or statements kept or signed by him to be "held by or to be due from him as such public servant, or to "duly account therefor, shall be guilty of the offence of criminal "breach of trust, and shall on conviction be subject to the penalty "provided by section 392.

"392B. Any person who, acting or purporting to act as the "agent of any other person, receives from a postal officer any "postal article for delivery to such other person and—(*a*) wilfully "throws away, destroys, keeps, or secretes; or (*b*) without "reasonable excuse (the burden of proving which shall lie upon "him) fails to account for such article, or unduly delays such "delivery, shall be deemed guilty of criminal breach of trust, "and shall be liable to the punishment prescribed therefor."

It will be observed that the widest and most general provision is that contained in section 388, inasmuch as it applies to all members of the public. On the other hand, sections 390 to 392A apply to limited classes, treat their behaviour as more heinous and impose a heavier penalty. The final section, 392B, which like 392A is a later addition, creates a different crime and treats it as subject to the same penalties as those prescribed by section 389.

The question for their Lordships, therefore, is in the first instance whether the appellant is a member of the class or one of the classes embraced in section 392, or otherwise included amongst those referred to in the section. It was held in the courts of Ceylon, and is maintained by the respondent, that the appellant was entrusted with property in the way of his business as an agent and converted it to his own use and consequently comes directly within the words of the statute. On the other hand, the appellant maintains that the offence is limited to the case of one who carries on an agency business and does not comprehend a man who is casually entrusted with money either on one individual occasion or, indeed, on a number of occasions, provided that the evidence does not establish that he carries on an agency business. In the present case, it is maintained, no agency business was carried on: the appellant merely received certain sums of money and kept them temporarily, having provided for their ultimate payments by the encashment of his cheques.

The correctness of these contentions depends on the true construction of the language quoted. For the appellant his submission is put in two ways. Firstly, it is said that whatever might have been the result if the words "in the way of his "business" were omitted, their presence excludes the possibility of anyone who does not carry on an agency business coming within the section inasmuch as no one can misappropriate money "in his business" unless he is engaged in a business of some sort: a man may casually misappropriate money and be guilty under sections 388 and 389, but he cannot be included in the limited classes struck at in section 392 unless he is a member of one of the categories referred to.

Such a construction is, it is said, in conformity with the general scheme of the fasciculus of sections in which section 392 is found. Section 390 applies to carrier, wharfinger, or warehouse-keepers, and to no one else; section 391 to clerks and servants or persons so employed; and section 392A to public servants. Similarly, section 392 refers to several classes, it is true, but is confined to those types of person who are members of the categories set out. Banker and merchant are well known types as, indeed, are factor and broker. Attorney, their Lordships are told, is not a term naturally applied to a solicitor in Ceylon and might there apply to anyone holding a power of attorney, but in their Lordships' opinion it would be unsafe to draw any definite conclusion from this circumstance since the section is derived from an earlier English Act where an attorney forms one of a class and, before its enactment in Ceylon, was already to be found in use in India.

The judge of first instance took the view that the accused man could be found guilty of criminal breach of trust as an agent if being entrusted with property on behalf of some other person on one occasion only he dishonestly misappropriated it, and he so instructed the jury. He said: "'In the way of his business' "does not necessarily mean that the Crown must prove that the "accused carried on some sort of a business in which he under-"took agencies, undertook to act as an agent for various people. "It is sufficient if, on the particular occasion, he acted as an "agent of another," and again he said in effect: If you have no doubt that it is criminal breach of trust you will go on to

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consider whether he was acting as the agent of the manager of the Moratuwa depôt when he got the collection into his hands to deposit in the bank. . . . On that question again, it is not necessary that there should be any express words uttered by anybody to constitute him an agent. If there was a collection at the depôt which, according to the arrangement between the union and the bank, must be deposited by the manager from time to time at the bank, and he used the services of someone else to deposit the money in the bank, then that other would be acting as the manager's agent.

When the case came before the Court of Criminal Appeal in Ceylon the point was fully argued, and the view of the judge of first instance affirmed. In that court it was contended that banker, merchant, broker and attorney all referred to those persons who carried on business in those various capacities, and that the description " agent " must be construed as also applying to a person carrying on the business of an agent and to no other even if the words " in his business " had been omitted, but that the insertion of those words made it clear that the accused man must be carrying on the business of an agent and that if he was not he could not be guilty of an offence within the section.

The Court of Criminal Appeal rejected the argument on the ground that not all the categories of persons comprised in the section of necessity included those only who were engaged in a particular class of business. The term " banker or merchant," they said, might be descriptive of and confined to one engaged in the business of banker or merchant, but a man might be described as a broker though he acted as such on one occasion only, and the word attorney (in Ceylon, at any rate) would mean one who was not a lawyer but had been given a power of attorney even for one purpose, and on one occasion only. Similarly, it was said that the term " agent " was apt to comprehend anyone who was acting as agent in the matter in which he had misappropriated money though he had not been acting in that capacity on any other occasion.

The argument that the subsection comprehends only those engaged in a particular occupation does not lack authority in England. It is supported by three cases spread over a period of time from *Rex* v. *Prince*[1] to *Reg.* v. *Portugal*[2] and *Reg.* v. *Kane.*[3] The principle is perhaps most clearly enumerated in the

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[1] (1827) 2 C. & P. 517.

[2] (1885) 16 Q.B.D. 487; 2 T.L.R. 14.

[3] [1901] 1 Q.B. 472; 17 T.L.R. 181.

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second of these cases where it is said [4]:—" It was contended by " the Crown, that, although the prisoner was not either a banker, " merchant, broker, or attorney, and although he was not " intrusted with either sum of money in any of those capacities, " yet he came within the term, 'other agent intrusted with " 'money or valuable security' within the meaning of section 75. " To this it was answered that, if that contention of the Crown " be correct, the section should have said, 'whosoever, having " 'been intrusted as agent with any money,' etc.; that no " interpretation or effect would be given to the words 'banker, " 'merchant, broker, or attorney;' and that, it was obvious that " some effect must be given to those words, if possible, in " construing the section, for otherwise the section might be held " to apply to everybody intrusted with money to be applied as " by the section is provided. In this we agree. We notice that " the Larceny Act, a portion of the 75th section of which we are " called upon to construe, after in earlier sections classifying " various places and things from and of which larceny may be " committed,—see sections 31, 38, 40, 50, 60, 62, and 63,— " proceeds to specify certain classes of persons who may be guilty " of the offences therein described; for instance, from section 67 " to section 73, clerks, servants, or persons in the public service " are classified; in section 74, tenants and lodgers are classified; " and in section 75 and afterwards the class aimed at is that of " agents, bankers, factors. In our judgment section 75 is limited " to a class, and does not apply to everyone who may happen to " be intrusted as prescribed by the section, but only to the class " of persons therein pointed out."

So far the reasoning is directly applicable to the case under consideration, subject to such immaterial variations as the provisions of the two Acts require. It is true that the judges who tried the case went on to place some reliance on the fact that the English Act, 24 & 25 Vict. c. 96, s. 75, uses the words " banker, " merchant, broker, attorney, or *other* agent " and to draw the inference therefrom that the agent must, like the preceding types, form one of a class. But this is only an additional ground for their decision and is merely used as a support of the view which they already entertained. *Kane's* case [5] in the Court of Crown Cases Reserved followed *Reg.* v. *Portugal*,[6] though that court was

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[4] 16 Q.B.D. 487, 490.

[5] [1901] 1 Q.B. 472.

[6] 16 Q.B.D. 487.

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not bound by the earlier decision. Save to this extent it does not add any further support to it.

It was argued on behalf of the Crown that the word "attorney" has a different meaning in Ceylon from that which it bears in England and that the Act now under consideration does not contain the word "other." So far as the second matter is concerned, it is to be noted that the Ceylon Penal Code does include the phrase "in his business," and in their Lordships' view this expression is at least as important as the word "other" in the English Act. So far as the word "attorney" is concerned, their Lordships would point out that the wording of the Ceylon Act is obviously taken direct from the Larceny Act, 1812, 52 Geo. 3, c. 63, s. 2, which is repeated in 24 & 25 Vict. c. 96, s. 75.

In the case of an English Act the doctrine is well established that the interpretation put upon an earlier statute by the courts should as a rule be followed in a case where similar words are used in a later statute. So in the case of a colonial statute it has been held by this Board that in colonies where an enactment has been passed by the legislature in the same terms as an English statute, the colonial courts should adopt the construction put upon the words by the English courts—see *Trimble* v. *Hill.*[7] It is true that in that case the decision referred to was one given by the Court of Appeal and that the courts which it was said should follow it were courts of a colony, but in their Lordships' view English courts should themselves conform to the same rule where there has been a long-established decision as to a particular section of an Act of Parliament, and even more so where there has been a series of decisions over a period of years. They accordingly are of opinion that in the case of the courts of a member of the British Commonwealth of Nations a similar course should be followed.

In enunciating the construction which they have placed on section 392 they would point out that they are in no way impugning the decisions in certain cases that one act of entrustment may constitute a man a factor for another provided he is entrusted in his business as a mercantile agent, nor are they deciding what activity is required to establish that an individual is carrying on the business of an agent. In the present case the appellant clearly was not doing so, and was in no sense entitled to receive the money entrusted to him in any capacity, nor,

[7] (1879) 5 App.Cas. 342.

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indeed, had Mr. Ranatunga authority to make him agent to hand it over to the bank.

Accordingly their Lordships have humbly advised Her Majesty to allow the appeal. The appellant has, however, plainly been guilty of a criminal breach of trust under section 389 of the Penal Code of which the jury could have found him guilty in conformity with section 183 of the Criminal Procedure Code. The Court of Criminal Appeal on their part could, under section 2 of the Court of Criminal Appeal Ordinance, have substituted a verdict of guilty under section 389 in place of that under 392, and should have done so if, as their Lordships think, the appellant had clearly committed an offence under the earlier section.

The Board have therefore, as already indicated, humbly advised Her Majesty to allow the appeal, discharge the conviction under section 392 and substitute for it a conviction under section 389. In respect of this offence the appellant must serve a sentence of three years' imprisonment less the period of time during which he has been imprisoned under the conviction appealed from.

Appeal allowed.
Substituted conviction and sentence imposed.

Solicitors: *Barrow, Rogers & Nevill; Burchells.*

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Mar. 24.

ATTORNEY-GENERAL FOR ALBERTA AND ANOTHER . . . . APPELLANTS;

AND

HUGGARD ASSETS LD. . . . . . RESPONDENTS;

AND

ATTORNEY-GENERAL FOR CANADA AND OTHERS . . . . INTERVENERS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada (Alberta)—Mines and minerals—Petroleum and natural gas—Grant by Dominion—Power to impose royalties—Validity—Transfer of Dominion rights to Province—Dominion Lands Act,

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* *Present*: Lord Porter, Lord Oaksey, Lord Reid, Lord Tucker and Lord Asquith of Bishopstone.

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1908, *c.* 20, *s.* 76 (*k*)—*Alberta Natural Resources Act* [*Transfer Agreement Act*], 1930, *S.A. c.* 21, *ss.* 1, 3.

The respondents were the successors in title of an interest in petroleum and natural gas derived from Crown lands of which the original grantees had obtained a grant in 1913 from the Crown in right of the Dominion of Canada pursuant to Orders in Council of 1911 and 1913. The grant provided, inter alia, " to have and to " hold the same unto the grantee in fee simple. Yielding and " paying unto us and our successors such royalty upon the said " petroleum and natural gas, if any, from time to time prescribed " by regulations of our Governor in Council. . . ." At the time of the grant none of the regulations then in existence affecting the terms on which the Dominion could dispose of Crown lands, mines and minerals in Alberta prescribed a specific rate of royalty chargeable in respect of petroleum or natural gas. After the Transfer Agreement of 1930, however, pursuant to which Crown lands, mines and minerals in Alberta were vested in the Crown in right of the Province, the Province by various Orders in Council made between 1941 and 1948 purported to impose a royalty on any petroleum and natural gas derived from lands, etc., vested in the Province. The respondents thereupon instituted proceedings claiming, inter alia, that the Province was not entitled to exact such royalty in respect of the petroleum and natural gas derived by them under their grant.

Held, first, that in the circumstances, and having regard to the terms of the grant of 1913, and in particular to the words " from " time to time," the reddendum purported to entitle the Crown in right of the Dominion, as grantor, to levy royalties " prescribed " by regulation made after the date of the grant—it purported to have a prospective operation.

Held, secondly, and assuming, without deciding, that the terms of the grant—a grant subject to a " variable royalty " (a royalty which the grantor might vary from time to time at his uncontrolled discretion)—were inconsistent with, and in breach of, the requirements of tenure in free and common socage—that, inter alia, the sum paid must be " certain "—which tenure was expressly provided for in the Charter of 1670 under which the Hudson's Bay Company was granted Rupert's Land (out of which the Province of Alberta was later carved), that those requirements of socage tenure were not still valid when the grant was made in 1913, but had been so modified by competent Dominion legislation, consisting of successive Dominion Lands Acts, regulations and orders passed subsequent to the transfer of Rupert's Land to the Dominion in 1870, as to validate the grant.

There was nothing to prevent the Governor in Council in right of the Dominion from making the Orders in Council of 1911 and 1913 under the powers conferred by section 76 (*k*) of the Dominion Lands Act, 1908, by providing that the present case should be governed with respect to royalties by the superseded Consolidated Regulations of 1906 (made under the Dominion Lands Acts, 1886 to 1892), which provided, inter alia, for the levying of "a royalty "at such a rate as may from time to time be specified by Order in "Council" on the sales of petroleum. The effect of the Orders in Council of 1911 and 1913, read together, was to authorize the grant of 1913, including the imposition of royalties.

The grant of 1913 was accordingly valid in respect, inter alia, of variable and prospective royalties reserved to the Crown in right of the Dominion. Those rights having been transferred to the Province of Alberta by virtue of the Transfer Agreement Acts of 1930, the right to levy a "variable" royalty on the lands in question was a "right" which, within section 3 of the Alberta Transfer Act of 1930, by "contract . . . or other arrangements . . . "relating to . . . lands, mines, minerals or royalties" was originally reserved to the Crown in right of the Dominion and by sections 1 and 3 of the Alberta Act of 1930 was transferred to the Crown in right of the Province of Alberta, which, accordingly, was justified in levying by the various Orders in Council of 1941 to 1948 the royalties in question.

Judgment of the Supreme Court of Canada [1951] S.C.R. 427, reversed.

APPEAL (No. 27 of 1951), by special leave, from a judgment of the Supreme Court of Canada (February 6, 1951) which affirmed, but on different grounds, a judgment of the Appellate Division of the Supreme Court of Alberta (January 4, 1950) which had affirmed a judgment of the trial judge (August 14, 1949).

The following introductory statement is taken from the judgment of the Judicial Committee: The issue raised on this appeal was, shortly, whether the Crown in right of the Province of Alberta was entitled to levy certain royalties from Huggard Assets Ld., respondents in the appeal and plaintiffs in the action, on petroleum and natural gas derived by them from a certain area in that Province.

The facts leading up to this litigation, which would have to be unfolded in more detail later, could with advantage be stated in brief outline at the outset. The plaintiffs claimed an interest in those minerals as successors of a company called the Northern Alberta Exploration Co. Ld., the original grantees of the area under a grant in the form of a patent dated August 25, 1913. The grantor was the Crown in right of the Dominion.

The Crown in right of Alberta succeeded, under the Transfer Agreement Acts of 1930, to any right which the Crown in right of the Dominion had theretofore owned in Crown lands, mines and minerals situate in Alberta, and royalties derived therefrom; together with the right to enforce "any power or right,

" which, by any contract, lease or other arrangements, or by any " Act of the Parliament of Canada relating to any of the lands, " mines, minerals or royalties hereby transferred or by any " regulation made under any such Act, was reserved " to the Crown in right of the Dominion. Those provisions had been described as constituting a " statutory novation," the Province stepping into the shoes of the Dominion, and succeeding to its rights. The main issue in the case was whether the Dominion, at the time of the grant in 1913, was entitled to the right to exact royalties, which were now in dispute. The determination of that issue depended on the answer to two further questions: (1) What, on its true construction, did the grant of 1913 in its reddendum purport to provide in respect of royalties payable by the grantee ? (2) Whatever on its true construction that provision meant, was it legally valid and enforceable?

The habendum and reddendum of the grant provided: " To " have and to hold the same unto the grantee in fee simple. " Yielding and paying unto us and our successors such royalty " upon the said petroleum and natural gas, if any, from time to " time prescribed by regulations of our Governor in Council, it " being hereby declared that this grant is subject in all respects " to the provisions of any such regulations with respect of royalty " upon the said petroleum and natural gas or any of them, and to " such regulations governing petroleum and natural gas as were " in force on September 1, 1909:" and there followed provisions for forfeiture on failure to pay such royalty.

At the time of the grant there were regulations in existence affecting the terms on which the Dominion could dispose of Crown lands, mines and minerals in Alberta, but none of those regulations prescribed a specific rate of royalty chargeable in respect of petroleum or natural gas derived from those sources.

The Supreme Court of Alberta, Trial Division (McBride J.) decided for the plaintiffs. He considered that only point (1)—the construction of the reddendum of the grant—was in issue. The judge decided—erroneously in the view of their Lordships of the Board—that the reddendum did not on its true construction purport to entitle the Crown as grantor to impose royalties on petroleum and natural gas by regulations to be made in future, none having been imposed thereon by any regulation in force when the grant was made. He did not consider what might be the validity of a provision which *did* purport to give the Crown such a right: but decided for the plaintiffs on the ground that the

Crown did not in the grant even stipulate for the power it claimed later to exercise.

The defendants appealed to the Appellate Division of the Supreme Court which, the four judges (O'Connor, MacDonald, Parlee and Ford JJ.A.) being equally divided, dismissed the appeal.

There was then a further appeal to the Supreme Court of Canada. The judges (seven in all) (Rinfret C.J., Kerwin, Rand, Kellock, Estey, Cartwright and Fauteux JJ.) were unanimously of opinion that the trial judge and the Appellate Division were in error in supposing that the reddendum of the grant did not purport to have a prospective operation. They all thought that according to its tenor it empowered the Crown to prescribe royalties in respect of petroleum and natural gas by a regulation posterior to the date of the grant, albeit none were prescribed by any regulation anterior to that date. In that view their Lordships of the Board had recorded their concurrence. The Supreme Court, though favourable to the appellant defendants on that point, dismissed the appeal by a majority of four to three, for a different reason: one which was not raised before them by counsel, and which had certainly been raised by no one in the Trial or Appellate Divisions.

The main reason for that decision was that owing to the supposed application of Charles II's Statute of Tenures, 1660 (12 Car. 2, c. 24) a royalty in the form contended for by the Crown was contrary to law, bad for uncertainty, and void, and that no competent legislation had validated it. They further held that the condition for payment of royalties being bad, the forfeiture clause conditioned on its breach was bad also, and that the grant was valid minus the provision as to royalties.

The appellants, the Attorney-General for the Province of Alberta and the Minister of Lands and Mines of the Province, now appealed.

1952. October 6, 7, 8, 9, 13, 14, 15, 16 and 20. *H. J. Wilson Q.C.* (of the Canadian Bar), *Gahan Q.C.* and *W. Y. Archibald* (of the Canadian Bar) for the appellants. This is a test case of great general importance on which there is a great difference of judicial opinion, and the decision in which will apply to a vast tract of land in Western Canada held on similar terms; it is for that reason that the Provinces of Manitoba and Saskatchewan are supporting the appeal. The Attorney-General for Canada also

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supports the appeal because the validity of certain Dominion grants has been called in question. Under the Dominion Lands Act, 1908, and the regulations and orders made thereunder the Governor in Council could impose such royalties as he thought fit, and the short submission for the appellants is that after the natural resources in Alberta were transferred to the Province under the Transfer Agreement Acts of 1930 the Lieutenant Governor in Council of the Province could exercise the same rights in the same manner as the Governor in Council could have done before the passing of those Acts. The Province was placed in the shoes of the Dominion, and as the Dominion had had the right to impose such royalty as it thought fit from time to time, so the Province succeeded to that right—it was subrogated to all the rights of the Dominion government. The land in question was subject to the reservation contained in the habendum clause in the grant, and the appellants say that the Provincial Lands Act, 1942, of Alberta, c. 62, as amended by c. 28 of the 1946 Statutes of Alberta, section 4, and by section 6 of c. 35 of the 1947 Statutes of Alberta, which provided that " notwithstanding the terms . . . " of any mineral lease or mineral sale . . . whether made by the " Crown in the right of the Dominion of Canada or by the Crown " in the right of the Province, and which is subject to the " payment of a royalty on the minerals . . . the royalty to be " computed, levied and collected shall be as now prescribed by " the Lieutenant Governor in Council or hereafter from time to " time prescribed by him . . . ," indicated the intention of the Province to carry out the terms of the transfer agreement and impose a royalty.

The trial judge (McBride J.) was of opinion that the inquiry was narrowed down to a proper interpretation of the language employed in the grant. He stated that the real question was whether or not the provisions of the grant were such as to reserve to the Crown the right to impose new royalties in the future, none having been prescribed at the date of the issue of the grant. He held that the habendum clause did not give the right to impose or prescribe royalties in the future and found in favour of the plaintiffs (the present respondents). He followed *Majestic Mines Ld.* v. *Attorney-General for Alberta.*[1] It is not conceded that that case was properly decided, and in any event the present case can be clearly distinguished from it and it is not applicable. As was said by Kerwin J. in this case[2]: " The wording in the patent

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[1] [1941] 2 W.W.R. 353; [1942] 1 W.W.R. 321; [1942] S.C.R. 402.

[2] [1951] S.C.R. 427.

"in question in that case [the *Majestic Mines* case[3]], however, "is quite different from the one before us. Here, the words are "'Yielding and paying unto us and our successors such royalty "'upon the said petroleum and natural gas, if any, from time "'to time prescribed by regulations of our Governor in Council.' "The words 'from time to time prescribed' do not appear in "the grant considered in the *Majestic Mines* case[3] and I agree ". . . that they are prospective." The words "from time to "time" have always been interpreted as having a prospective meaning. Unless the habendum clause in this case can be given a prospective meaning it is redundant and meaningless. On the "prospective effect" point the judges of the Supreme Court were all of the opinion that the reservation had a prospective effect.

Secondly, it is submitted, contrary to the view held by four of the judges in the Supreme Court, that the reservation to the Crown in the habendum clause was not void for uncertainty, but was certain within the rule as expressed in the maxim id certum est, quod certum reddi potest. [Reference was made to section 19 of the Interpretation Act, R.S.C., 1906, c. 1.] Applying the well-known rules of interpretation, the reservation could not be said to be uncertain: *Ex parte Voisey; In re Knight*[4]; *Daniel* v. *Gracie*[5]; *In re George Edwin Gray*[6]; *Cooper* v. *Stuart*[7]; *Pearce* v. *Watts*.[8] Having regard to the authorities, there is no difficulty in this case in pronouncing that this royalty reserved to the Crown as set out in the habendum clause is not void for uncertainty, but is certain within the meaning of the above-mentioned maxim.

The majority in the Supreme Court erred in holding that royalties or payments reserved to the Crown in the habendum clause of the grant constituted a "rent service," from which such "royalties" differ in many important respects. This is not a rent service, but is a royalty, and the cases on the English Statute of Tenures, 1660 (12 Car. 2, c. 24), are not particularly apt. Cheshire's Modern Real Property, 5th ed., p. 193, defines rent services as consisting of "an annual return." The reservation here differs from a rent service in these respects: there was no annual return—there might never be; the Crown had granted an estate in fee simple, and therefore the payment reserved could not be said to be rent, and the relationship of landlord and tenant in the ordinary sense does not exist in this case; the remedy here set forth for failure to pay the royalty is not distress; it is forfeiture. In those important respects the rent reserved here is not a rent service within the ordinary accepted meaning of that term: *Gowan* v. *Christie*.[9]

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[3] [1941] 2 W.W.R. 353.
[4] (1882) 21 Ch.D. 442, 455.
[5] (1844) 6 Q.B. 145.
[6] (1918) 57 S.C.R. 150, 170.
[7] (1889) 14 App.Cas. 286.
[8] (1875) L.R. 20 Eq. 492.

The main point is that the grant was issued under and in compliance with wide statutory powers and therefore the reservation could not be void for uncertainty. Reliance is chiefly placed on the provisions of section 76 (*k*) of the Dominion Lands Act, 1908, which was in force when the grant was made. Shortly, the contention for the appellants is that the Dominion Lands Acts from that of 1886 onwards permitted the sale of lands in either of two ways: (i) by the Minister or other official acting under the regulations; or (ii) by a special Order in Council. No limitation takes place on the Governor in Council as to what conditions he should impose. It is submitted that the repeal of the regulations of 1906, which were made under the Dominion Lands Acts, 1886 to 1892, and which provided, inter alia, for the levying of "a "royalty at such a rate as may from time to time be specified "by Order in Council" on the sales of petroleum, has no effect whatsoever. The Orders in Council of 1911 and 1913 were orders of the Governor in Council made under the special power conferred by section 76 (*k*) of the Act of 1908, and by those orders he adopted certain of the rescinded regulations where these were applicable and thus incorporated regulations in respect to the imposition of a royalty from time to time. Those regulations must therefore be looked to to see what the grant was intended to cover. A case which interpreted those regulations is *Rex* v. *Chappelle*,[10] and the language there used as to the intention of Parliament is apt to the present case and was approved and adopted by this Board in *Chappelle* v. *Rex*.[11]

Lastly, if there is a grant specifically authorized by statute or regulations made under it, the question of uncertainty cannot arise: *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.*[12]

On the transfer of the natural resources there was a statutory novation and the Province of Alberta was placed in the shoes of the Dominion, and the reservation in the habendum clause in the grant was a valid and legally enforceable condition to the grant which from the enactment of the transfer agreement of 1930 became enforceable by the Crown in right of the Province.

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[9] (1873) L.R. 2 Sc.App. 273, 283.

[10] (1902) 32 S.C.R. 586, 638.

[11] [1904] A.C. 127, 132.

[12] [1900] 2 Ch. 352.

Gahan Q.C. for the Attorney-General for Canada. The Attorney-General for Canada is concerned to uphold the effectiveness of what has been done in this and similar cases, and submits that what was done in this case was a valid act taking effect according to its terms. Two problems have to be faced: (i) whether when the regulations of 1906, which had been in force, had been rescinded, it was possible for this grant to be made pursuant to an order of the Governor in Council; and (ii) the question whether the legislation as it existed in Canada enabled the Governor in Council by regulation or order to authorize grants which provided for a fluctuating royalty or one that should be paid according to regulations made from time to time. From beginning to end of the present case there was no irregularity of any kind. What was done was within the authority which the Governor in Council had under section 76 of the Act of 1908. There is a vital distinction, and there is no inconsistency, between cases where the Governor in Council is empowered to authorize other people—officials—to dispose of lands—a power of the Governor in Council so to regulate the conduct of officials who are carrying out regulations—and himself making a special order which might be in the form of a regulation. He is authorized to deal with Dominion lands in very wide terms. The question will resolve itself into whether on the true construction of the Act of 1908 the Governor in Council is prohibited from doing what he had purported to do. [Reference was made to the material provisions of the various Dominion Lands Acts from 1872 to the Act of 1908.]

The present case comes within the second branch of section 76 (*k*) of the Act of 1908: "The Governor in Council may . . . "make any regulations which are considered necessary to give "the provisions of this section full effect." Section 77 of that Act shows that the Governor in Council may act by order and not merely by officials carrying out regulations. The whole conception of the Act supports that view of the sections. On the legislation as a whole, there is no reason why, construing this Act as enabling the Governor in Council to authorize other people to dispose of lands, he is himself to be deprived of the power of disposing of them on any terms which he thinks fit. He is given the power under section 76 (*k*) to do what he did in this case. A construction which would invalidate these orders because they are not regulations is one which should not be adopted if any other construction is reasonably possible.

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With regard to the allegation that the grant was void for uncertainty, Rand and Kellock JJ. in the Supreme Court, referring to the Statute of Tenures of 1660, said that this royalty is uncertain in a way that makes it impossible for it to exist in a tenure of free and common socage. The answer to that is two-fold: (i) each time you have an Order in Council imposing a royalty, then you have fixed what it is to be—each party knows perfectly well what its obligation is; (ii) there is statutory authority for the imposition of the royalty. Nothing is more reasonable than the imposition of a variable royalty, because of varying factors and conditions. Where there is a grant concerned with taking away oil, it is a perfectly proper and natural provision that an Order in Council from time to time might impose a royalty. There is nothing to restrict the meaning of section 76 (*k*).

M. C. Shumiatcher Q.C. (of the Canadian Bar) for the Attorney-General for Saskatchewan. Saskatchewan has no particular interest in this grant itself, but other grants were made in some parts of Saskatchewan which would be in a similar position to this grant, and the issue is therefore one of great concern to the Government of Saskatchewan. The position which the Province takes is briefly this: that the special Order in Council has in fact the same force and effect as if made under and by virtue of a regulation, or as if made by the Minister pursuant to or under a regulation. Our position is that the orders and the regulations in effect stand on very much the same footing. No clear distinction has ever been drawn between what might be called regulations and orders, although throughout this period the statutes did draw a distinction, or purported to do so: Dominion Lands Acts of 1886, 1906, section 159, and section 37 of the Act of 1908. There is in fact no way of knowing whether an order is an Order in Council or a regulation except by looking at the face of the document, and in fact it would be for the Governor in Council to determine the complexion of the document: C. K. Allen on Laws and Orders, pp. 45–6. There was nothing to prevent the Governor in Council from incorporating the regulations of 1906 into the grant as terms which might have been written into the grant itself. Those powers must come from statute and be exercised in terms of the statute. There is no uncertainty raised in the habendum clause in respect of royalties. The right of the Governor in Council to vary the order prescribed from time to time is not one which may be exercised capriciously: *Anthony* v. *Attorney-General for Alberta.*[13] The grant must be looked at as at the date when it was made.

The effect of the Alberta Act, 1905, S.C., c. 3, creating the Province, was that all royalties, mines and minerals and interests therein which the Crown in right of Canada held were to remain the property of the Crown in right of Canada following the establishment of the Province of Alberta: section 21 of that Act should be very widely interpreted. Those interests reserved are to be regarded as part of the public property of Canada. Any kind of interest can be created provided that it falls within the category of public property of Canada. The Dominion Parliament being supreme could by legislation vary the rate of payments required to be made under all grants of land whoever the parties were. In this case the grant expressly provides for a change in the royalties to be paid and they are no less subject to legislative variation than any other grant. The Province under the Natural Resources Agreement, 1930, succeeded to these rights exercisable by the Dominion under the grant. The fact that there might be a dichotomy of legislative powers between Dominion and Provincial Governments has been considered by this Board: *Smith* v. *Vermillion Hills Rural Council*[14]; but the principle there stated does not apply to the interest of the Dominion in this land; that could be dealt with in such manner as the Dominion thought fit. If the view expressed by the majority of the Supreme Court that the grant was beyond the powers of the Lieutenant Governor in Council to grant or authorize be correct, then the whole grant, and not merely the reservation, is invalid.

Geoffrey Cross Q.C. and *Nigel Warren* for the respondents. The respondents seek to establish five main submissions. (1) That between the date of the passing of the Dominion Lands Act, 1908, and the date of the grant of the patent on August 25, 1913, Crown lands in Alberta containing minerals could be sold either (a) under the authority of regulations made by the Governor in Council under section 37 of the Dominion Lands Act, 1908, or alternatively, (b) under the authority of a special Order in Council. (2) That the patent in this case was in effect issued under the authority of the order of March 21, 1913, and not under any regulation at all. (3) That the order of March 21, 1913, did not even purport to authorize the reservation of any royalty on the sale, and therefore even if such a reservation could have been validly authorized by the order the reservation inserted in the patent was not in fact authorized. The effective order and sole authority is that of 1913. (4) Which deals with the point raised by Rand and Kellock JJ. in the Supreme Court (whose judgments were concurred in by Estey and Cartwright JJ.): if, contrary to the third submission (supra), the order of March 21, 1913, purported to authorize the reservation of a royalty fluctuating in amount with the decision of the Governor in Council from time to time, the reservation was invalid since it was prohibited by section 4 of the Statute of Tenures of 1660, which formed part of the law of Rupert's Land before Rupert's Land became part of Canada, and had not been repealed by the Dominion Parliament between 1870 and 1913. Finally, (5), and this is an alternative submission and deals with the constitutional point which Rand J. had in mind, the reservation by the Crown in right of the Dominion on a grant of Crown lands in Alberta in fee made after the creation of the Province, of a right to impose and increase from time to time rent and royalties payable in respect of the granted lands, was void as infringing the legislative right of the Province with regard to lands situated in the Province. There are also a number of subsidiary points to be dealt with later.

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[13] [1943] S.C.R. 320, 331.

[14] [1916] 2 A.C. 569, 573.

The first point (supra) is based on the Dominion Lands Act, 1908. On a fair construction of that Act and of section 76 (*k*) it was open to the Governor if he thought fit to make a special Order in Council authorizing the sale of lands because there were no regulations authorizing sale at that time. The Act, it is submitted, contemplates two forms of orders, Orders in Council which give rise to regulations, and Orders in Council which give rise to orders. With regard to the second point, it is not possible to say that Mr. Bennetto, a predecessor in title of the respondents, in whose favour a reservation had been made under the old 1906 regulations, had acquired " a right or privilege " (section 19 of the Interpretation Act, 1906) under the regulations when his current renewal expired. The mere fact that they were wrong in thinking that the regulations had been rescinded did not prevent this from being a sale under a special order. The third point raises a pure question of construction and turns on the terms of the order of March 21, 1913. The only authority for the issue of the patent in this case was the order of March 21, 1913. The first order had lapsed and this was an entirely fresh order, and on the issue of it there was no reservation permissible with regard to minerals. It was a fresh order imposing new terms, and if it had been intended to bring in the old conditions of the former regulations of 1906 as part of the new order they would have done so. On the true construction of this order no royalty is reserved. There cannot be read into it the terms of the old regulations, especially in view of the variation of the purchase price and the reference to the rights of squatters. Nobody suggested that the order itself was not right and ought to be altered in any way. If the respondents can satisfy the Board that on the true construction of the order a royalty ought not to be reserved, then the onus shifts to the other side to show that the order is not consonant with the intention of the Crown. The grant was perfectly all right except for this additional reservation which the Crown was not permitted to exact. If one part of the grant was made in excess of power it should be struck out. As a matter of construction the regulations and consequently the power to impose a royalty are not embodied in the order of March 21, 1913.

The fourth point (supra) is the relevant one on which the majority of the Supreme Court decided this case in favour of the respondents, and to make the submissions apparent some discussion of the law of tenure in this country is necessary. [Reference was made to the history and development of land tenure from the time of the Norman Conquest to the Statute Quia Emptores, 1290, of Edw. 1.] Many of the subtenants held by socage, where the rent was fixed. The difference between tenure by knight service and socage tenure is stated in Coke on Littleton, 1832 ed., vol. 1, section 120. Military tenure involved personal service and in addition varying amounts in money from time to time, whereas socage was for a fixed rent. The terms of the Charter to the Hudson's Bay Company are set out in *Hudson's Bay Co.* v. *Stevens*,[15] and the grant of May 22, 1670, was "in "free and common socage," and not "in knights service" on payment of "two elks and two black beavers." It is submitted that the passage cited from Littleton does show plainly that the grant by the Crown to hold land at such a rent as the Crown with the advice of his Council should from time to time have made would have been treated by Littleton and Lord Coke as undoubtedly a grant in military service and not in socage. The next stage is the passing of the Statute of Tenures of 1660, which abolished tenure by knight service, and the effect of which was that after that date it has not been competent to the Crown to make a grant of Crown lands in fee simple by any tenure other than socage tenure. If the Crown attempts to reserve to itself some incident of tenure which is inconsistent with socage, that is prohibited by section 4 of the Act of 1660 unless, of course, the section has been repealed in Canada. That section was part of the law of Rupert's Land in 1870. After 1870, when Rupert's Land had been transferred to the Dominion, and assuming that the Dominion Parliament had the power to repeal section 4 of the Statute of Tenures, it is submitted that the Dominion Parliament has never in fact done so. If the provisions of a statute are not expressly repealed by another statute the courts will only hold that they are impliedly repealed if there is some inconsistency between the two statutes which makes it impossible to read the second one consistently with the first although the first has not been repealed.

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[15] (1909) 5 Tax Cas. 424, 425.

What has to be considered with regard to this fourth point is first of all whether the reservation in a Crown grant of an amount fluctuating with the decision of the Crown in Council from time to time was a possible incident of socage tenure. If the Board is against the respondents on that it will not have to go any further. If, however, it is in the respondents' favour and holds that the reservation of such a rent was not a possible incident of socage tenure and that a grant reserving such a rent would be a grant in knight service, the second point is whether on the true construction of the Dominion Lands Act, 1908, the Governor in Council was empowered by the Parliament of Canada to make such a grant notwithstanding section 4 of the Statute of Tenures, which, it is submitted, became the law of that part of Canada in 1870 on the admission of Rupert's Land. The third ground, assuming that the respondents are right in the submission that there was no power, is whether the result is that the provision as to the royalty is ineffective as being repugnant to the grant of the Crown in socage tenure, and whether the result is that the whole patent is nugatory. On the first point above, the maxim id certum est, quod certum reddi potest does not carry one very far. Reliance is placed on Coke on Littleton again, 1832 ed., vol. 1, sections 98 and 120. [Reference was also made to the History of English Law, by Pollock and Maitland, 1895 ed., vol. 1, p. 271.] So it is submitted on this first point that this particular rent service fluctuating with the decision of the Crown in Council from time to time was not a possible incident of socage tenure, but would create knight service or some unknown form of tenure. It is not in any event a grant in free and common socage. If the Board is against the respondents on that, that is an end of this point. Assuming that that submission is right, the next question is as to the effect of the Dominion Lands Acts. When a later enactment is worded in purely affirmative terms and does not expressly refer to the previous enactment at all, it is not held to repeal it: the principle is stated in Maxwell on Interpretation of Statutes, 9th ed., p. 177, dealing with implied repeal. It is not suggested that it is necessary to have an express repeal of section 4 of the Act of 1660, but it is suggested that if it is to be held that there is an implied repeal the words on which reliance is placed must be words which are clearly not capable of being read consistently with the earlier Act. It is incredible that the Dominion Parliament by very general words should have conferred power to make dispositions in defiance of section 4 of the Statute of Tenures.

On the fifth main point, which is entirely independent of the former argument, Rand J. in his judgment said that "from the "creation of the Province it is clear that any interests disposed of "by the Dominion would automatically come under its exclusive "jurisdiction through the force of section 92 of the Confederation "Act." *Attorney-General for Alberta* v. *Attorney-General for Canada*,[16] however, though it is against the respondents here, shows that there is no doubt that the Crown in right of Canada was in the position of the Crown in this country and that it had the ultimate feudal ownership of land with the incidents thereto. So to apply strict English doctrines in respect of tenures in Canada is not improper. [Reference was also made to *Attorney-General for Ontario* v. *Mercer*.[17]]

The subsidiary points are, first, counsel for the appellants said that the royalty in this case was not a rent at all: the answer to that is to be found in Halsbury's Laws of England, 2nd ed., vol. 20, para. 170. Secondly, it was said for the appellants that if it was a rent in some sense, it was not a rent service. It is submitted that it must be one of two kinds, either a rent service or a rentcharge. Rents paid on Crown grants in fee are, it is submitted, rent services—that is their ordinary nature. For the distinction between a rent service and a rentcharge, see Cheshire's Real Property, 3rd ed., p. 197. Thirdly, *Rex* v. *Chappelle*[18] was prayed in aid for the appellants. That case has no bearing on the present problem; nor has *Cooper* v. *Stuart*[19]—the considerations which influenced the Board in that case are not present

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[16] [1928] A.C. 475, 486.

[17] (1883) 8 App.Cas. 767, 778.

[18] 32 S.C.R. 586; [1904] A.C. 127.

[19] 14 App.Cas. 286, 288.

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here. Lastly, it would not follow that there was a forfeiture of the respondents' interest if the royalty was void. If the reservation was effective, it is not sought to contend that such right as the Crown had did not pass to the Province in 1930.

Nigel Warren followed, and referred to *Selby* v. *Greaves*,[20] and submitted that in this case the maxim id certum est, quod certum reddi potest did not apply.

H. J. Wilson Q.C. in reply. The respondents' first point is accepted. With regard to the second and third points, it is agreed that the order of March 21, 1913, was the authority, but not that it contained the full terms of the arrangement; the appellants' view is that the two Orders in Council of 1911 and 1913 must be read together, and that they constitute the basis for the grant. Until the issue of the grant there was no clear evidence of a concluded contract. It is clear from the whole transaction that the parties were conducting themselves in such a way that they intended that a variable royalty should be inserted in the document itself, and that the concluded contract should issue with the grant itself, and that was accepted by the respondents' predecessor in title as being the contract. The answer to the respondents' fourth point is two-fold: (i) it is not conceded that the order was prohibited by the Statute of Tenures at all; and (ii) the Statute of Tenures was entirely inapplicable to the grant in question or to the territory. [Reference was made to para. 118 of Coke on Littleton, and to Pollock and Maitland's History of English Law, vol. 1, pp. 253, 291.] A tenure of the nature of royalty does not fall within the category of military service, and must consequently fall under socage. The respondents have not been able to establish that this type of reservation falls within knight service either under Littleton or any other authority. The respondents have not been able to show that a reservation of this character was invalid by virtue of the fact that it was prohibited by section 4 of the Act of 1660. If there was any prohibition in England, it ought not to be applied in Canada: the Act of 1660, which was applicable in England to feudal tenures, should not be made applicable to the conditions in a young and growing country. [Reference was made to *Board* v. *Board* [21] and *Walker* v. *Walker*.[22]] The circumstances and conditions under which the Act of 1660 was passed indicate clearly that it was purely local in character and could not be extended to Dominions overseas: in essence, that Act was taking away from the Crown some of the old feudal incidents of tenure and substituting a money revenue. In the absence of statute, that law could not apply to the conditions as they existed in Western Canada: *Uniacke* v. *Dickson* [23]; *Attorney-General* v. *Stewart* [24]; *In re Simpson Estate*.[25] The decisions and a number of Provincial statutes all show that there has only been incorporated into the law of Canada such portions of the law of England as were suitable to that country. *Cooper* v. *Stuart* [26] has a very real bearing on the facts of the present case and is directly in point. It is conceded that the grant in *Rex* v. *Chappelle* [27] was very different from that here, but reliance is placed on the remarks of Davies J. in that case when interpreting the sections which are under discussion in the present case. Davies J. said that "no more effective or comprehensive language could have been used by Parliament" in dealing with the lands under section 47. That passage is peculiarly apt to this case, and it was adopted by this Board in *Chappelle* v. *Rex*.[28] In the development of the natural resources it was necessary for the Dominion Parliament in the early days when this land was being opened up to have the widest powers in a manner that would protect the interests of all concerned.

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[20] (1868) L.R. 3 C.P. 594, 602.

[21] [1919] A.C. 956.

[22] Ibid. 947.

1953. March 24. The judgment of their Lordships was delivered by LORD ASQUITH OF BISHOPSTONE, who stated the facts set out above and continued: (1) The first question which their Lordships have to decide is whether in these circumstances, having regard to the terms of the grant, and in particular to the words "from "time to time," the reddendum purported to entitle the Crown, as grantor—then in right of the Dominion—to levy royalties "prescribed" by a regulation, or a succession of regulations, made *after* the date of the grant. Their Lordships have considered this question and are clearly of opinion that the answer must be in the affirmative. The grant *does* purport to confer such a right on the grantor. This was the unanimous opinion of the Supreme Court of Canada. Any other answer would render the words "from time to time" meaningless. It is true that in *Majestic Mines Ld.* v. *Attorney-General for Alberta* [1] a different conclusion was reached, but the crucial words "from time to "time" were absent, and clearly the decision might have been the other way if they had been present. (Their Lordships may point out, as some argument was based on the words "if any" as used in the reddendum in the present case, that in their view these words plainly qualify the word "royalty" and not "petroleum or natural gas," or "natural gas" only.)

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[23] (1848) 1 James' Nova Scotia R. 287, 289.

[24] (1817) 2 Mer. 143.

[25] [1927] 3 W.W.R. 534.

[26] 14 App.Cas. 286, 292.

[27] 32 S.C.R. 586, 638.

[28] [1904] A.C. 127, 132.

[1] [1941] 2 W.W.R. 353.

(2) This answer, however, merely disposes of the problem what it was that the grant *purported* to provide. A more difficult question remains, viz.: whether the grant could validly contain such a provision. This question emerged when, some time after the 1930 Transfer Agreement had vested Crown lands, mines and minerals (situate in Alberta) and rights and powers in respect of royalties on such lands, etc., in the Crown in right of that Province, the Province, by various Orders in Council made between 1941 and 1948 (ref.: S/C p. 3, para. 6) purported to impose a royalty on any petroleum and natural gas derived from lands, etc., vested in the Province by the 1930 Act. As the result of this imposition the plaintiffs brought the present action and claimed in the prayer to their statement of claim the following relief:—"1. A declaration that the Lieutenant Governor in "Council (of Alberta) was not entitled to exact any royalty with "respect to petroleum and natural gas produced from the lands. "2. An order rectifying the patent by striking out all references "to royalties."

Four points of varying importance may conveniently be noted here:—

(a) No facts are alleged, or were proved, which could possibly support a plea of rectification. There was no preceding contract representing the real bargain to which the terms of the grant failed to give effect. This disposes of the second branch of the prayer.

(b) The respondents at no stage contended—nor did the appellants—that the grant was *wholly* invalid. The respondents impugned only the provision as to royalties, wishing this to be deleted and the rest to stand.

(c) No point was taken in the statement of claim, or at any stage of the argument till the case was heard before this Board, to the effect that a grant in terms of this reddendum or a royalty levied in accordance therewith could only be authorized by a regulation as opposed to an Order in Council. At every stage until the ultimate appeal an Order in Council was assumed to be as good as a regulation for these purposes. Nevertheless, much of the Board's time was occupied with this argument and with a number of other contentions not raised below.

(d) No point was taken by counsel prior to the hearing before this Board, that the English Statute of Tenures, 1660 (12 Car. 2, c. 24) extended to this region of Canada and invalidated any grant of minerals in fee simple on terms which permitted the Crown as grantor to levy a royalty the existence or quantum of which could be determined from time to time by its own caprice or whim. This last point was, however, raised proprio motu by the Supreme Court of Canada which, by a majority of four to three, decided the appeal before them largely on it.

It is now time to indicate the course which the proceedings below followed.

[His Lordship then stated what was held by the three courts below and continued:] Such is a bare summary of the three Canadian decisions upon which the appeal came before this Board. The ratio on which the Supreme Court of Canada reached its conclusions, albeit by a bare majority, must be most carefully weighed, and a more precise account of it given; for so far it has only been adumbrated. But before doing so, their Lordships observe that it may prove convenient to describe a royalty which the grantor claims to be entitled to impose for the first time after the contract or grant, at any figure he chooses, or to vary from time to time at his uncontrolled discretion, as a "variable "royalty." It will also make for brevity to refer to the areas which came to be called after 1670 " Prince Rupert's Land " and the " North Western Territories," simply as " Rupert's Land."

The argument in support of the proposition that the grant could not validly provide for a " variable royalty " in this sense of the term may be summarized under the following heads:—

(1) A royalty is akin to rent, if not a species of it. A rent must be " certain ": and a rent variable at the whim of the lessor is uncertain. So, therefore, is a royalty similarly variable: and unenforceable independently of any argument founded on the Statute of King Charles II.

(2) The Statute of Tenures, 1660, applies to Canada or that part of it called Rupert's Land, which was vested in the Dominion in 1870 and from which in 1905 Alberta (including the mineral lands in question) was carved out. This statute, by clauses 2 and 4, abolishes grants in fee of land on tenures (such

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as the old English tenure by knight service) for which the consideration consisted at one time of uncertain services, or of payments by way of composition for such services which reflected in their quantum or in the method of their determination the uncertainty of the services themselves. Clause 4 provided that "all tenures hereafter to be created by the King's Majesty. . . "Upon any . . . grants . . . of any estate of inheritance at "the common law shall be in free and common socage, and "shall be adjudged to be in free and common socage only, "and not by knight service or in capite, and shall be discharged of all wardship value and forfeiture of marriage, "livery, primer seisin, ouster le main," and certain other burdens incident to tenure by knight service. Clause 4 relates to estates to be created "hereafter." Clauses 1 and 2 abolish knight service tenure and its characteristic burdens (which in those clauses were described as including "escuage") in respect of existing states, and convert them also into tenure by free and common socage, free from those burdens for the future. The hall mark, it was said, in Littleton, Coke on Littleton, and Blackstone, of tenure by "free and common socage" was and is that any services, or cash composition in lieu thereof, must be "certain": and, so the argument continued, since a "variable royalty" could not be described as "certain" in any sense of the word, ergo "a variable royalty" was prohibited by the statute.

(3) It was further contended that whether or not the Act of 1660 applied to Rupert's Land with the results described in (2) above, in any case the Charter, by which in 1670 Charles II granted Rupert's Land to the Hudson's Bay Company expressly included a term providing for the prevalence of free and common socage as the standard basis of tenure of land therein. The same result, it was suggested, could be reached if Rupert's Land was a "settled" colony (as it has been since held to be: *Walker* v. *Walker*[2]; *Board* v. *Board*[3]): even if there were no such provision in the Charter, for it is well established that settlers import into a settled colony the common and statute law of their country as they existed at the time of settlement, and so far as applicable to the settled territory. But the terms of the Charter would seem to make resort to this rule superfluous so far as the establishment of socage tenure is concerned.

[2] [1919] A.C. 947; 35 T.L.R. 633.

[3] [1919] A.C. 956; 35 T.L.R. 635.

All these three arguments, even if otherwise sound, are liable to be met by two answers:—(1) that a "variable" royalty *is* consistent with "free and common socage," or (2) that if it is not, Dominion legislation has displaced the requirement of such socage tenure and validated a form or forms of tenure which are inconsistent with it. The second of the three arguments—that based on the Act of 1660—may, in addition to these possible objections, be exposed to a third—namely, that the Statute of Charles II never applied to Canada—or to the material part of Canada, namely "Rupert's Land."

Their Lordships proceed to consider each of these three arguments in turn: in the first instance in abstraction from the possible effect of any "validating" legislation.

(1) They do not consider that the first of the arguments in question is established. There may well be an analogy between royalties in respect of a grant, and rent in respect of a lease, and it may well be that rents must be in some sense of the word "certain." But what does "certain" mean in this connexion? What is an "uncertain" rent? A rent, payable in year one, the amount of which is to depend on events which cannot happen till year three, would seem to be in any sense of the word, "uncertain" and bad. The tenant could never tell till year three how much rent he was liable to pay in year one; consequently, neither he nor his lessor could know for how much, if anything, the latter could in year one distrain. This is an extreme case. Short of it, it is clear that a fluctuating rent is not as such necessarily "uncertain"—certainly not if it is mathematically calculable, so as to attract the operation of the maxim "certum est quod certum reddi potest." The only decided case cited to the Board in which a rent was held "uncertain" is the old case of *Parker* v. *Harris*,[4] the report of which is both laconic and obscure. It would seem that what was "uncertain" there was not the quantum of the rent but the times at which it was to be payable. It is said in the present case that the royalty is "uncertain" because its amount depends on the whim, from time to time, of the grantor. It seems doubtful whether this quality is fatal. In this very case, the Charter of 1670 provided for a royalty which in some sense depends on the whim of the grantor, the King. He is to receive two elks and two black beavers every time he visits the territories in question. No one can tell whether he will visit the territory

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[4] (1692) 1 Salk. 262.

at all; nor if he does, how often: yet his unpredictable election to visit it never, seldom, or repeatedly determines the number of elks and beavers to be " yielded up." In these circumstances their Lordships are not satisfied that this contention is made out. But whether sound or unsound, it would still (like the other two) fall to the ground if adequate " validating legislation " were proved.

(2) The majority of the Supreme Court, as has been stated, based their decision, in the main, on the Statute of Tenures, 1660. Their reasoning assumes that this statute applied to Canada, or at least to " Rupert's Land." The Act has no express " extent " clause. An Act of the Imperial Parliament today, unless it provides otherwise, applies to the whole of the United Kingdom and to nothing outside the United Kingdom: not even to the Channel Islands or the Isle of Man, let alone to a remote overseas colony or possession. In 1660 there was, of course, no United Kingdom. The Acts of Union of 1706 (with Scotland) and of 1800 (with Ireland) were still in the womb of time. True, it happened that since the accession to the English throne of James I—already then King of Scotland—the same person was the Sovereign of both England and Scotland, just as later, the same person was to occupy the British and the Hanoverian throne. But that coincidence of sovereignties is beside the present purpose.

Their Lordships are unaware that there was, in 1660, any technical rule of draftsmanship governing the geographical area to which an English Act of Parliament was presumed to apply where its terms were silent on that point. The question whether such an Act applied outside England (which since 1536 has by Act of Parliament included Wales) must depend in such circumstances on the intention of its framers, to be deduced from the nature of its subject-matter and substantive provisions. It would presumably have no such external application if its subject-matter were beyond question of merely insular and domestic import.

Their Lordships, if it were necessary to decide the point, would incline to the view that the Act of 1660 was of purely local application; that it applied to England only. Its main objects were two: to abolish certain oppressive incidents of feudal military tenure, " wardships," " marriages," " primer seisin," " ousterlemain," and the like. To effect this it was necessary to abolish the military or knight service tenures themselves—the soil from which those incidents sprang. Their sacrifice must involve the King in financial loss, for which he was to be compensated under the terms of the Act (clauses 15 to 27) by certain duties on strong liquors, for instance, beer, cider, perry and aqua vitae; some home produced, some imported. It seems to their Lordships strained to suppose that such an Act, recording a compromise between the King of England and his people, the main object of which was the abolition of certain peculiarities of our insular medieval land tenure, was intended to apply to a vast tract of country thousands of miles away which was only inhabited at the time by a few Indians and half castes; people who had never smarted under wardships, marriage and primer seisin, and had almost certainly never heard of them. It seems to their Lordships that these and the other provisions of the Act —notwithstanding that it provides that "free and common "socage" should prevail in future, and abolishes tenure by "escuage"—were not intended to apply outside England and Wales, to which, along with Berwick-on-Tweed, the machinery for collecting the compensatory duties is expressly confined (clause 47).

Their Lordships have dwelt on this point somewhat at length because the judgments of the majority of the Supreme Court of Canada are so largely founded on it. Having regard, however, to the conclusions they have reached on other points, it is almost academic, because, apart from the rule governing settled colonies, the Charter of 1670 under which the Hudson's Bay Company was granted Rupert's Land provides expressly for tenure of that land in "free and common socage and not in capite "or by Knightes service." That being so, two questions remain: A. Were the terms of the grant which is in question in this case —a grant subject to a "variable royalty"—inconsistent with and in breach of the requirements of tenure in "free and common "socage"? B. If yes, were those requirements still valid when the grant was made in 1913, or had legislation, regulations or orders passed in the meantime so far modified them as to validate the grant?

A. The first of these questions is open to doubt, for, as their Lordships have observed, in the Charter itself the consideration moving from the tenant—the royalty—is as to its amount largely at the discretion of the grantor, the King of England. If he chooses never to visit the area, no royalty is payable at all; and this would seem to argue that a considerable degree of "uncertainty" in the consideration moving from the tenant is compatible with "free and common socage," notwithstanding the dicta of Littleton, Coke and Blackstone to the contrary. One instance given by Littleton (Coke on Littleton, 96A) of a tenure on " certain " services is where the tenure depends on the tenant shearing all sheep on the grantor's land, a service which can clearly be made more or less burdensome according as the grantor chooses to have upon his land few or many sheep. Littleton himself describes this as a " certainty in uncertainty."

Rather than plunge into the jungle of learned disagreement which surrounds what is or is not involved in free and common socage, their Lordships will assume, without deciding, that it is inconsistent with the terms of the grant of 1913.

B. Upon that assumption, the residual question is whether competent legislation has validated the grant. Their Lordships have come to the conclusion that it *has* done so. There can be no question that the Dominion Parliament was competent at all material times, after 1870, by clear enactment to repeal or vary any law as to land tenure prevailing in Rupert's Land before that region was in that year vested in the Dominion, even if this meant introducing forms of tenure unknown in the past to English law, or forbidden by it. The question is not whether the Dominion possessed the necessary power, but whether in fact it exercised it.

The legislature of a new country with a small population and vast possibilities of development might well favour an elastic policy in its efforts to attract settlers, and be the less inclined to submit indefinitely to the fetters of English feudal tradition in such matters as land tenure.

By a complex of legislation between 1868–70, into the details of which their Lordships do not think it necessary to enter, the Hudson's Bay Company surrendered its grant of Rupert's Land for £300,000, and on June 23, 1870, that region was admitted to the Dominion. The Charter of 1670 under which it had been granted to the Hudson's Bay Company expressly provided, as has been seen, that tenure should be in " free and common socage." Interim legislation (e.g., the Act of 1869 (Dom.), 32 & 33 Vict. c. 3) provided that all laws in force in Rupert's Land at the time of its admission should (unless contrary to the British North America Act, 1867) remain in force till altered. An Imperial Act of 1871 (34 & 35 Vict. c. 28), " to remove doubts," confirmed all Dominion statutes relating to this transaction and gave power to the Dominion, inter alia, to make provision for the " peace order " and good government . . . of any territory not yet for the time " being included in any province " (which would aptly describe that part of Rupert's Land which later became Alberta). Subsequent Dominion Acts followed, containing similar provisions, e.g., Revised Statutes of Canada, 1906, c. 62 (which itself reproduced similar provisions in an Act of 1886 and even earlier legislation) and by section 12 enacted as follows:—" Subject to the provi-" sions of this Act, the laws of England relating to civil and " criminal matters, as the same existed on the fifteenth day of " July, in the year one thousand eight hundred and seventy, shall " be in force in the Territories, in so far as the same are " applicable to the Territories, and in so far as the same have not " been, or are not hereafter, as regards the Territories, repealed, " altered, varied, modified, or affected by any Act of the Parlia-" ment of the United Kingdom or of the Parliament of Canada, " applicable to the Territories, or by any ordinance of the " Territories."

This provision was in force at the time of the disputed grant of 1913.

It can hardly be said that tenure by socage was in 1870 a part of the " laws of England " *inapplicable* to Rupert's Land, since this tenure had been in force in that tract under the terms of its charter, for exactly two centuries before its transfer to the Dominion. Nevertheless, the question remains whether by competent legislation subsequent to the transfer, this part of the " laws of England " had been " repealed, altered, varied or " modified " in such a way as to validate the present grant. Such validating provisions, if they exist, must be sought mainly, if not entirely, in the successive " Dominion Lands Acts " and regulations or orders made thereunder.

The Dominion Lands Act in force at the time of the 1913 grant was c. 20 of the statutes of 1908. Before referring to its terms it may however be helpful to refer to an earlier statute, the Dominion Lands Act, 1886 (R.S.C. 1886, c. 54). Section 47 of that Act reads as follows:—" 47. Lands containing coal or other " minerals, whether in surveyed or unsurveyed territory, shall " not be subject to the provisions of this Act respecting sale or " homestead entry, but shall be disposed of in such manner and " on such terms and conditions as are, from time to time, fixed " by the Governor in Council, by regulations made in that behalf," and was reproduced by section 47 of the Dominion Lands Act, 1892, with the addition of a proviso which does not affect the present case. The Act of 1886 further provided by section 90:— " The Governor in Council may . . . (*h*) Make such orders as are "deemed necessary from time to time to carry out the provisions "of this Act according to their true intent, or to meet any cases "which arise, and for which no provision is made in this Act; "and further make and declare any regulations which are considered necessary to give the provisions in this clause contained "full effect; and, from time to time, alter or revoke any order or "orders or any regulations made in respect of the said provisions, "and make others in their stead."

Their Lordships pause to note two points in relation to these provisions of the Act of 1886.—(1) Section 47 gives the Governor in Council powers as wide as are readily imaginable as to the "disposal" of coal and other minerals *by regulation.* He can impose any terms he, "from time to time," fancies: and employ any method of disposal. If this provision had stood unmodified at the time of the grant, and a regulation had been made giving effect to it, it would, in their Lordships' view, have authorized the grant notwithstanding any inconsistency between the terms of the grant and technical socage tenure. (2) Side by side with this power, in section 90 (*h*) there is a power to make "orders"—in certain special cases, e.g., "casus omissi." These two parallel powers are somewhat sharply distinguished; and the distinction persists in the Act of 1908, to which reference should next be made. Before, however, going to that statute, it is proper to note that regulations under the Act of 1886 (as amended in 1892) were made between 1901 and December, 1906, inclusive, in which month they were consolidated. They will be referred to as "the 1906 regulations" and their tenor explored later, so far as relevant.

The sections of the Act of 1908 corresponding to those cited from the Act of 1886 and dealing respectively with "regulations" and "orders" are section 37 and section 76 (*k*) of the later Act. Section 37 is as follows: "Lands containing salt, petroleum, "natural gas, coal, gold, silver, copper, iron or other minerals "may be sold or leased under regulations made by the Governor "in Council: and these regulations may provide for the disposal "of mining rights underneath lands acquired or held as agricultural, grazing or hay lands, or any other lands held as to the "surface only, but provision shall be made for the protection and "compensation of the holders of the surface rights, in so far as "they may be affected under these regulations."

Section 76 reads: "The Governor in Council may . . . "(*k*) make such orders as are deemed necessary to carry

" out the provisions of this Act, according to their true intent, " or to meet any cases which arise, and for which no provision is " made in this Act; and further make any regulations which are " considered necessary to give the provisions of this section full " effect."

Thus this Act maintains the distinction between regulations and orders, which seemingly are intended to serve different purposes; and the distinction, in this Act of 1908, is emphasized by section 77 thereof, which reads as follows: " 77. Every regulation made by the Governor in Council, in virtue of the provisions of this Act, and every order made by the Governor in " Council authorizing the sale of any land or the granting of any " interest therein, shall have force and effect only after it has " been published for four consecutive weeks in The Canada " Gazette, and all such orders or regulations shall be laid before " both Houses of Parliament within the first fifteen days of the " session next after the date thereof, and such regulations shall " remain in force until the day immediately succeeding the day of " prorogation of that session of Parliament, and no longer, unless " during that session they are approved by resolution of both " Houses of Parliament." This section provides that while both regulations and orders shall be laid before both Houses of Parliament within 15 days of the session next after their date, regulations (though not, apparently, orders) shall become inoperative on the day succeeding the prorogation of the session of Parliament unless during the session approved by a confirmatory resolution. Orders are seemingly not now defeasible for want of such a resolution; though it will be observed that the corresponding section of the Act of 1886—section 91—while providing for similar formalities, does not distinguish between the effect of not complying with them in the case of a regulation on the one hand, and an order on the other.

As against this, attention should be called to a difference between the language of section 37 of the Act of 1908 and section 47 of the Act of 1886, which would seem, if it is significant, to limit the almost despotic powers of disposal vested in the Governor in Council by the latter provision. For where section 47 spoke of " disposal " of lands, etc., " in such manner and " on such terms and conditions as are, from time to time, fixed " by the Governor in Council," by " regulations," section 37 provides simply that such lands, etc., " may be sold or leased " under regulations made by him." On the other hand, if this change of language does impliedly narrow the powers of the Governor in Council under the Act of 1908 when proceeding by regulations, there is no corresponding limitation in that Act in his powers to proceed by *order*. On the contrary, an order (though no doubt it can be superseded by a later order) cannot, like a regulation, lapse for want of a confirmatory resolution, and would seem to be capable of dealing with cases uncovered, or not adequately dealt with, by any regulation.

As regards "regulations," the position is complex and obscure. But the instrument by virtue of which the grant of 1913 purported to be made was an Order in Council, or rather two such orders, dated May 31, 1911, and March 21, 1913, and not a regulation. The point that a grant in these terms could not be made under orders but only under some regulation, and that no such regulation at the material time existed, was not taken until the case was argued before this Board.

The points therefore remaining are:—(1) Did these orders, if themselves valid, purport to authorize a grant in the terms of that of August 25, 1913? (2) Were the orders which purported to be made under section 76 (*k*) of the Act of 1908 a valid exercise of the powers conferred by that subsection? Or should the subsection be read as not authorizing any order which runs counter to tenure by "free and common socage"?

Before grappling with these questions, it may be pertinent to ask for what reason the Acts of 1886 and 1908 provided that some things could be done by regulations and some by order. That this was done deliberately admits of no doubt. The only question is "why?" Their Lordships can only suppose the explanation to be that a *regulation* normally (though perhaps not quite necessarily) applies uniform treatment to everyone or to all members of some group or class. There is one and the same "rule" ("regula") for all. On the other hand, there may be special cases which the rule did not contemplate ("casus omissi," are expressly instanced in the Acts) or to which, owing to special circumstances, it cannot apply without hardship, or without violating the spirit—"the true intent"—of the Act; and the object of the "order-making" power is to enable the Crown to make special and equitable provision ad hoc for such cases.

If anything is clear, it is that this case was a very special one, not covered by ordinary rules; and was so considered and treated by those who on behalf of the Crown in right of the Dominion made the two orders and issued the grant or patent. What do the two orders provide? Their Lordships, while holding they should be read together, will deal with them, in the first instance, seriatim.

I. The first order, dated May 31, 1911, opens with a reference to regulations assumed to be obsolete or rescinded: "the late regulations": and refers to them in its last paragraph once more as "the old regulations." These are the regulations made under the Acts of 1886 and 1892 between 1901 and 1906 inclusive, and referred to above as "the 1906 regulations" because they were issued in a consolidated form in December of 1906. These consolidated regulations had provided (by paragraph 1) for the "reservation" in suitable cases for purposes of prospecting for petroleum of an area of 1,920 acres, in favour of an applicant for such reservation, of land in, inter alia, the Province of Alberta. They further provided (paragraph 5 of the consolidation) that "if oil in paying quantities should be discovered by the prospector" an area not exceeding 640 acres of land, including the oil well, would be sold to the person making such discovery at the rate of $1 per acre, and the remainder of the reserved area, viz., 1,280 acres, would be sold at the rate of $3 per acre. Paragraph 6 provided that "a royalty at such a rate as may from time to time be specified by Order in Council will also be levied and collected on the sales of the petroleum . . .": paragraph 8 provided that the patent which might "be issued for petroleum lands" would be made subject to the payment of the above royalty; and that the patent might be declared null and void for default in the payment of such royalty.

The order of May 31, 1911, when it refers to these regulations as the "late" or "old" petroleum regulations, assumes them to have been rescinded. This may be either because they were made under the Dominion Lands Acts of 1886–92, and not under that of 1908; or more probably because in 1910 there had been made new regulations purporting to rescind the regulations of 1906, and to substitute a power of leasing for a power of sale, lease or other disposal.

These last regulations were not included in the appendix of exhibits, and were only produced in the course of the argument before the Board as the result of cables to Canada. It seems doubtful in the circumstances whether any notice should be paid to them at all, particularly as the Board was informed that they were void or had lapsed for failure to be laid before the two

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Houses of Parliament, or having been so laid to obtain the necessary confirmatory resolution. Let it, however, be assumed in the respondents' favour that the regulations of 1906 were validly rescinded. Then what was their position? There was, in their Lordships' view, nothing to prevent the Minister from proposing, or the Governor in Council from making, an Order in Council, under the powers conferred by section 76 (*k*) of the Act of 1908 dealing with a special case of hardship by providing that it would be governed by the rescinded regulations of 1906 if the equity of the case appeared to him so to require. And this is what in fact the Orders in Council of May 31, 1911, and March 21, 1913, professed to do.

The facts leading up to both orders must here be reviewed more closely. A " reservation " had been made under the old " 1906 regulations " in favour of a Mr. Bennetto on January 1, 1906, of a tract of land in Alberta, which may be called " tract X." Bennetto had done prospecting work on that tract, which was continued by his assigns the Northern Alberta Exploration Company, the assignors to the respondents. Oil had been discovered, but not in " paying quantities," hence no right of sale had been acquired by anyone. Meanwhile the "reservation" was due to expire on June 17, 1911. The Northern Alberta Company asked for a renewal of the reservation. The order recites that large expenditure had been incurred by Bennetto and the company, and provides that the reservation of petroleum and gas rights should be extended in favour of the company for two years from June 17, 1911, but that it should apply to land other than, though overlapping with, the land originally covered by the reservations. This may be called " tract Y." This substitution was necessitated by the acquisition by bona fide squatters of a large area of riverain territory covering part of the surface of " tract X "—the original reservation. The order of 1911 finished by reciting and giving effect to the following recommendation:—" Should oil or natural gas be discovered in " paying quantities within the period of one year from June 17, " 1911, the Minister also recommends that he be authorized to " sell to the company, under the provisions of the old petroleum " regulations, all the lands contained within the entire area above " mentioned both as regards the surface and petroleum and " natural gas rights, and that if oil in paying quantities is discovered after the expiration of the first year, but before June 17, " 1913, he be authorized to sell to the company the petroleum "and natural gas rights under the entire area reserved and the "surface rights of that portion lying between the southerly "boundary of the McMurray Settlement and Horse Creek."

II. The second Order in Council, that of March 21, 1913, recites these facts and the provisions of the Order in Council of 1911, in particular its final paragraph, which has just been quoted. It does not record, and presumably it was not the fact, that within one year, or even nearly two years of June 17, 1911, oil or natural gas "in paying quantities" had been discovered in the substituted area; but it does record that valuable prospecting work had been done by Bennetto and the Northern Alberta Company, and that at least $75,000 had been expended by them by October, 1912. The Order in Council ended by providing as follows: "That in view of the very large expenditure which the Northern "Alberta Exploration Co. Ld. has incurred for the purpose of "demonstrating the existence or otherwise of petroleum in the "McMurray field, which demonstration must be of very great "public benefit, and in view of the fact that the location first "reserved for the application was lost to him through the "encroachment of squatters, the Minister recommends that the "above company be permitted to purchase the petroleum and "natural gas rights under the entire area reserved for them by "the Order in Council dated May 31, 1911, together with the "available surface rights thereof, at the rate of $3.00 an acre, "subject, however, to such rights as may be established under "the provisions of the Dominion Lands Act and the regulations, "by any persons in a position to show that they have in the "meantime squatted upon these lands."

If these two orders are read together, their effect, if they are intra vires the statute of 1908, is to authorize the grant which followed on August 25, 1913, both as regards the price of the land and "under rights" sold and as regards royalties. The price under the grant appears to have been $3 an acre both for the surface (1,296 acres) and the mineral rights (1,320 acres). If the Order in Council of 1911 had stood alone, the price would have been $1 as to part and $3 as to another part, for the order of 1911 imports the 1906 regulations and that is what they provide. But the Order in Council of 1913 alters this rate to $3 overall, and the grant is so far within the authority conferred by the two orders read together. A more important matter in this appeal is that the grant contained as part of its terms what has been described as a "variable royalty." The Order in Council of 1911 imports in this regard also the terms of the "old" regulations;

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they are called the "regulations in force on September 1, 1909," but these are the same as the "1906 regulations" and these authorize (in the regulation of May 31, 1901, or paragraph 6 of the consolidating regulation of 1906) the levy of royalties on petroleum sold "at such a rate as may from time to time be "specified by Order in Council." It matters not, in their Lordships' view, whether by the years 1911–13 these regulations had been rescinded or not, or whether the Acts of 1886–92, under which the regulations of 1906 had been made, had been repealed or superseded by the Dominion Lands Act of 1908, or whether, while the regulations of 1906 were operative, the levy of such royalties under them was to be contingent on a sale which was itself to be contingent on the discovery of petroleum in paying quantities. Under section 76 (*k*) of the Act of 1908 the Crown in right of the Dominion had, in their Lordships' opinion, power to deal with a case such as this by applying to it certain of the terms (those as to royalties) of a superseded regulation. This was a special case. Oil and gas had not been discovered in paying quantities, but research and expenditure, attended with much benefit to the public, had been carried out and incurred by the prospectors, the predecessors in title of the respondent company. Hence they were allowed to acquire the land and rights in question without complying with any regulation (assuming one to exist), but were compelled to submit to liability in future to a royalty not prescribed by any regulation in force at the time of the grant.

Their Lordships do not consider that in dealing with such special or hard cases under section 76 (*k*) it was intended that the discretion of the Crown should be fettered or controlled by incidents of English feudal land tenure. It had been expressly enacted that the Dominion Parliament could repeal, vary or modify any English law prevailing before 1870 in territories such as Rupert's Land, and territories like Alberta which might be carved out of it. In providing as it did in section 76 (*k*) of the Act of 1908 for a discretionary power to deal with hard or anomalous cases the legislature was, as it seems to their Lordships, arrogating to itself the right to infringe the requirements of "free and common socage," so far as the end in view required Where the justice of the individual case required it, it seems to their Lordships unreasonable (unless the language of the material enactments forces them to such a conclusion) to hold that the Crown's liberty to deal with such cases was intended to be exercised only within the limits set by a rigid respect for the (obscure and debated) frontiers of historical socage tenure.

If this conclusion is justified, it follows that the grant of 1913 was valid not only in other respects but in respect of the variable and prospective royalties reserved to the Crown in right of the Dominion. Those rights have now been transferred to Alberta. In 1930 the "Transfer Agreement Acts" were passed in identical terms by the legislatures of Alberta (Statutes of Alberta, 1930, c. 21), of the Dominion (Statutes of Canada, 1930, c. 3), and of the Imperial Parliament (20 & 21 Geo. 5, c. 26). Section 1 of the Alberta Act is as follows: "In order that the Province may be "in the same position as the original provinces of Confederation "are in virtue of section 109 of the British North America Act, "1867, the interest of the Crown in all Crown lands, mines, "minerals (precious and base) and royalties derived therefrom "within the Province, and all sums due or payable for such lands, "mines, minerals or royalties, shall, from and after the coming "into force of this agreement and subject as therein otherwise "provided, belong to the Province, subject to any trusts existing "in respect thereof, and to any interest other than that of the "Crown in the same, and the said lands, mines, minerals and "royalties shall be administered by the Province for the purposes "thereof, subject, until the legislature of the Province otherwise "provides, to the provisions of any Act of the Parliament of "Canada relating to such administration; any payment received "by Canada in respect of any such lands, mines, minerals or "royalties before the coming into force of this agreement shall "continue to belong to Canada whether paid in advance or other-"wise it being the intention that, except as herein otherwise "specially provided, Canada shall not be liable to account to the "Province for any payment made in respect of any of the said "lands, mines, minerals or royalties before the coming into force "of this agreement, and that the Province shall not be liable to "account to Canada for any such payment made thereafter."

Section 3 of the Act is as follows: "Any power or right which, "by any such contract, lease or other arrangements, or by any "Act of the Parliament of Canada relating to any of the lands, "mines, minerals or royalties hereby transferred or by any regula-"tion made under any such Act, is reserved to the Governor in "Council or to the Minister of the Interior or any other officer of "the Government of Canada, may be exercised by such officer "of the Government of the Province as may be specified by "the legislature thereof from time to time, and, until otherwise "directed, may be exercised by the Provincial Secretary of the "Province."

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The right to levy a "variable" royalty on these lands was a "right" which within section 3 by "contract . . . or other "arrangements" . . . "relating to . . . lands, mines, minerals "or royalties" was originally reserved to the Crown in right of the Dominion, and by sections 1 and 3 was in 1930 transferred from the Crown in right of the Dominion to the Crown in right of the Province of Alberta, which accordingly was justified, through its Lieutenant-Governor in Council, in levying by the various Orders in Council of 1941–48 (set out in paragraph 6 of the statement of claim) the royalties complained of by the plaintiffs-respondents in the present case.

Their Lordships therefore humbly advise Her Majesty that the appeal should be allowed and the action dismissed. Each party must pay their costs of the proceedings throughout.

Solicitors: *Lawrence Jones & Co.; Stafford Clark & Co.; Blake & Redden.*

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Mar. 24.

ATTORNEY-GENERAL FOR ALBERTA . APPELLANT;
AND
WEST CANADIAN COLLIERIES LD. AND OTHERS . . . . RESPONDENTS;
AND
ATTORNEY-GENERAL FOR MANITOBA AND ANOTHER . . . . INTERVENERS.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA (APPELLATE DIVISION).

Canada—Alberta—Mines and minerals—Coal—Crown leases and grants —Royalties—Purported statutory increase—Conflict with existing statutory agreement—Ultra vires and void—Natural Resources Act [Transfer Agreement Act], 1930 (*S.A.* 1930, *c.* 21), *s.* 2—*Provincial Lands Act*, 1948 (*S.A.* 1948, *c.* 36), *s.* 8.

In 1930, by three concurrent enactments—of the Province of Alberta, the Dominion of Canada, and the Imperial Parliament—triple statutory force was given to a "transfer agreement" concluded in the preceding year by which the mineral lands and rights situate in the Province and theretofore vested in the Dominion were transferred by the Dominion to the Province, section 2 of the transfer agreement providing that the Province undertook to carry out according to its terms every contract to purchase or lease any Crown lands, mines and minerals made with the Crown in right of the Dominion before 1930, and "not to affect or alter any "term of any such contract to purchase, lease or other arrange-"ment by legislation or otherwise . . ." The Province having purported by section 8 of the Provincial Lands Act of Alberta of 1948 to fix the royalties payable under such leases at 10 cents per ton on coal mined and in the case of grants in fee simple at 15 cents per ton, "notwithstanding the terms and provisions of any . . . "agreement for sale, or lease . . . where the payment of a royalty "has been reserved to the Crown in the right of the Dominion or "in the right of the Province . . . ," the respondents, who were severally the holders of certain leases and grants of lands and coal rights in Alberta leased and granted originally by the Crown in right of the Dominion under the Dominion Lands Acts and regulations and Orders in Council from time to time made pursuant thereto, and in respect of which the royalties were roughly one-half of those specified in section 8 of the Alberta Act of 1948, claimed declarations (a) that section 8 did not apply to their leases and lands, and (b) that section 8 was ultra vires:—

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* *Present*: LORD PORTER, LORD OAKSEY, LORD REID, LORD TUCKER, and LORD ASQUITH OF BISHOPSTONE.

Held, that section 8 of the Act of 1948 was in conflict with section 2 of the transfer agreement, and was wholly ultra vires and null and void for all purposes.

Attorney-General for Manitoba v. *Attorney-General for Canada* [1925] A.C. 561, 568; 41 T.L.R. 409, applied.

Judgment of the Supreme Court of Alberta (Appellate Division) affirmed.

APPEAL (No. 49 of 1951) from a judgment of the Appellate Division of the Supreme Court of Alberta (August 8, 1951), affirming a judgment of the Trial Division of that court (April 16, 1951).

The following introductory statement is taken from the judgment of the Judicial Committee: The respondents were grantees or lessees of mineral lands and mining rights in the Province of Alberta (or in territories from which, in 1905, that Province was carved out). The grants and leases in question were originally made by the Crown in right of the Dominion, in which, in 1870, the parent territories had been vested. They were made under powers conferred by a series of Dominion statutes called the Dominion Land Acts, and by regulations and Orders in Council from time to time made in pursuance of those Acts.

In 1930, by three concurrent enactments, of the Province of Alberta (c. 21, Statutes of Alberta, 1930); of the Dominion (c. 3 of the Statutes of Canada, 1930); and of the Imperial Parliament (British North America Act, c. 26 of 1930), triple statutory force was given to a so-called "transfer agreement" concluded in the preceding year. By that agreement, which was in the nature of a novation, the mineral lands and rights situate in Alberta and theretofore vested in the Dominion were transferred by the Dominion to Alberta, and the transferee Province undertook to carry out according to its terms every contract to purchase or lease any Crown lands, mines and minerals made with the Crown in right of the Dominion before 1930. (See section 2 of the transfer agreement, which, together with the other relevant statutory provisions, are set out in full hereinafter. Similar transfer agreements were concluded with certain other Provinces and were scheduled, as was the Alberta agreement, to the British North America Act, 1930.)

In 1948 the Province of Alberta purported to pass a statute (c. 36, Statutes of Alberta, 1948), section 8 of which fixed the royalties payable under such leases at 10 cents per ton on coal mined, and in the case of grants in fee simple at 15 cents per ton on coal mined, "notwithstanding the terms and provisions of "any . . . agreement for sale, or lease . . . where the payment "of a royalty has been reserved to the Crown in the right of the "Dominion or in the right of the Province."

The various mineral grants and leases held by the respondents were ranged in certain categories of each of which a "type" was conveniently set out in the agreed statement of facts. Thus there were grant type I, grant type II, lease type I, lease type II and lease type III. The respondents in the prayer to their amended statement of claim claimed: "(*a*) A declaration that "said section 8 of chapter 36 of the Statutes of Alberta, 1948, "does not apply to the said leases and lands. (*b*) A declaration "that said section 8 of the Statutes of Alberta, 1948, is ultra "vires."

The Trial Division of the Supreme Court of Alberta (McLaurin J.) awarded a declaration in terms of paragraph (*a*) of the prayer, viz., that section 8 of the Act of 1948 "does "not apply" to any of those five types of transaction. The trial judge did not expressly make the declaration prayed for under paragraph (*b*), but it would appear that he made the declaration under paragraph (*a*) because he considered that the impeached provision was in conflict with the 1930 legislation and consequently ultra vires and void.

The Appellate Division (O'Connor C.J.A., Macdonald J.A., Parlee J. and Ford J.A.) dismissed the appeal, but their reasoning was slightly different as it turned largely on the decision of the Supreme Court of Canada in *Huggard Assets Ld.* v. *Attorney-General for Alberta*,[1] from which decision, since, an appeal had been allowed by the Board.[2]

The defendant now appealed.

1952. October 21, 22, 23, 27, 28, 29, 30; November 3, 5. *H. J. Wilson Q.C.* (of the Canadian Bar), *Gahan Q.C.*, and *W. Y. Archibald* (of the Canadian Bar) for the appellant.

H. S. Patterson Q.C. (of the Canadian Bar) and *Lord Hailsham* for the respondents.

H. J. Wilson Q.C. and *M. C. Shumiatcher Q.C.* (both of the Canadian Bar) for the Attorneys-General for the Provinces of Manitoba and Saskatchewan respectively, who supported the case for the appellant.

1953. March 24. The judgment of their Lordships was delivered by Lord Asquith of Bishopstone, who stated the facts set out above and continued: Their Lordships proceed to set forth in detail the relevant statutory provisions and the effect of their interaction. Sections 1 and 2 of the transfer agreement of 1930 are as follows: " 1. In order that the Province may be in " the same position as the original provinces of Confederation are " in virtue of section 109 of the British North America Act, 1867, " the interest of the Crown in all Crown lands, mines, minerals " (precious and base) and royalties derived therefrom within the " Province, and all sums due or payable for such lands, mines, " minerals or royalties, shall, from and after the coming into force " of this agreement and subject as therein otherwise provided, " belong to the Province, subject to any trusts existing in respect " thereof, and to any interest other than that of the Crown in the

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[1] [1951] S.C.R. 427.

[2] Ante, 420, sub nom. *Attorney-General for Alberta* v. *Huggard Assets Ld.*

"same, and the said lands, mines, minerals and royalties shall "be administered by the Province for the purposes thereof, "subject, until the legislature of the Province otherwise provides, to the provisions of any Act of the Parliament of Canada "relating to such administration; any payment received by "Canada in respect of any such lands, mines, minerals or "royalties before the coming into force of this agreement shall "continue to belong to Canada, whether paid in advance or otherwise, it being the intention that, except as herein otherwise "specially provided, Canada shall not be liable to account to the "Province for any payment made in respect of any of the said "lands, mines, minerals, or royalties before the coming into force "of this agreement, and that the Province shall not be liable to "account to Canada for any such payment made thereafter.

"2. The Province will carry out in accordance with the terms "thereof every contract to purchase or lease any Crown lands, "mines or minerals and every other arrangement whereby any "person has become entitled to any interest therein as against the "Crown, and further agrees not to affect or alter any term of any "such contract to purchase, lease or other arrangement by legislation or otherwise, except either with the consent of all the "parties thereto other than Canada or in so far as any legislation may apply generally to all similar agreements relating to "lands, mines or minerals in the Province or to interests therein, "irrespective of who may be the parties thereto."

Section 8 of the Alberta Act of 1948 is as follows: "44.c. Notwithstanding the terms and provisions of any certificate of title, agreement for sale, or lease which conveys coal or "the right to mine, win, work or excavate the same, where the "payment of a royalty has been reserved to the Crown in the "right of the Dominion or in the right of the Province, there shall "be payable to the Minister on, from and after the first day of "April, 1948, (*a*) a royalty of 10 cents per ton on any coal mined "or excavated from any land, the title to which is held under "lease from the Crown in the right of the Dominion or in the "right of the Province: (*b*) a royalty of 15 cents per ton on any "coal mined or excavated from any land, the title to which is "held in fee simple, or under an agreement for sale from the "Crown in the right of the Dominion."

It may be said with sufficient accuracy for the present purpose, that the royalties imposed by section 8 of the Act of 1948 in every case exceeded (indeed, roughly doubled) the royalties payable under the terms of the typical grants and leases in question. Under the terms of these instruments seven cents a ton were payable in respect of grants, and five cents a ton in respect of leases. At the time when each of the "typical" grants and leases were made, these were according to the "agreed "statement of facts" the rates of royalty specifically authorized by the regulations in force at the time: subject to the qualification that in grant type I no specific royalty at so many cents per ton is provided for, but "a royalty at such rate per ton . . . as "may from time to time be specified by our Governor-General in "Council."

Having regard, however, to the view which their Lordships take of the validity of section 8 of the 1948 statute, the detailed terms of the five types of grant and lease are not important. That view may be stated succinctly in advance of the reasoning which appears to their Lordships to support it. It is that section 8 is in conflict with section 2 of the transfer agreement and is wholly ultra vires and null and void for all purposes.

Section 2 of that agreement falls into two compartments: (1) a substantive provision extending up to the words "by legisla-"tion or otherwise"; and (2) a proviso, beginning with the word "except" and occupying the rest of the section. The question whether section 8 of the Act of 1948 conflicts with this provision, and, if so, to what extent, depends on the true construction of each of these compartments and it will be convenient to deal with them separately and seriatim.

As to the first portion of section 2, whereby the Province agrees "to carry out . . . every contract to purchase or lease "any Crown lands, mines or minerals, and every other arrange-"ment whereby any person has become entitled to any interest "therein as against the Crown, and further agrees not to affect "or alter any term of any such contract to purchase, lease or "other arrangement by legislation or otherwise": the appellant has argued that the contracts etc. here referred to are limited to executory agreements or arrangements and do not include conveyances or grants which, it is said, absorb and merge the contracts which lead up to them; but where a conveyance—and

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even a lease is a conveyance—has been executed but is subject to outstanding obligations of an executory nature, such as an obligation to pay royalties or rent, their Lordships entertain no doubt that such a state of affairs is covered by the words " contract to purchase or lease Crown lands . . . and every other " arrangement. . . ."

If, therefore, the section ended there—before the exception or proviso which occupies the last five lines of the section—it would be in flat contradiction of section 8 of the Alberta Act of 1948. Section 2 of the transfer agreement, which has the force, inter alia, of Imperial legislation, provides that the terms of pre-1930 Dominion leases and grants shall be scrupulously honoured by the Province after the transfer of mineral rights to the latter. Section 8 of the Provincial Act of 1948 is a naked assertion that the terms of such instruments can be wholly disregarded. This, and nothing less, is what the word " notwithstanding " in its context necessarily implies. Unless, therefore, there is something in the exception to section 2 of the transfer agreement to save section 8 of the Act of 1948, section 8 is ultra vires the transfer agreement, and the only question would be whether it is void in whole or only in part.

Before, however, embarking on that question their Lordships must consider the effect of the " exception " within one or other limbs of which the appellant contends that section 8 falls, and by so falling is saved. (1) One limb excepts cases where all the parties other than Canada consent. This can be disregarded, for by clause 13 of the agreed statement of facts it is admitted that there was no such consent. (2) A second limb of the exception excuses compliance with the enacting words in so far as the exempting legislation " may apply generally to all similar agreements relating to lands, mines or minerals in the Province or to " interests therein, *irrespective of who may be the parties* " *thereto*."

It is contended by the appellant that section 8 of the Act of 1948 is legislation " applying generally," etc. This contention cannot, in their Lordships' view, be sustained. Section 8, assuming it to apply to " all similar agreements," is not legislation " applying generally " to such agreements " irrespective of who " may be parties thereto "; for it only applies to agreements to which the Crown (in right whether of the Dominion or a Province) is a party: it does not apply when the agreement is between a private grantor or lessor—such as the Canadian Pacific

Railway or the Hudson's Bay Company—and a private grantee or lessee: a distinction recognized and applied in *cf. Anthony* v. *Attorney-General for Alberta.*[1] The objection that the scope of an exception is presumed not to exceed, or broaden, the scope of the substantive provision to which it is an exception, gives way when the words used in the excepting provision are sufficiently clear, as their Lordships consider that, in this passage, they are.

It follows that section 8 of the Act of 1948 is ultra vires section 2 of the transfer agreement and is invalid; and the next question is whether it is void in whole; or severable; valid in part and void in part. It is suggested that it is valid in part, namely, that part which refers to " contracts," etc., made by the Crown in right of the Province, though not in respect of that part which refers to contracts made by the Dominion. Their Lordships are of opinion that it is wholly ultra vires and wholly void. The test is very clearly laid down by Lord Haldane in the *Grain Futures* case (*Attorney-General of Manitoba* v. *Attorney-General of Canada*)[2]: " If, therefore, the statute seeks to impose on the " brokers and agents and the miscellaneous group of factors and " elevator companies who may fall within its provisions, a tax " which is in reality indirect within the definition which has been " established, the task of separating out these cases of such " persons and corporations from others in which there is a legiti- " mate imposition of direct taxation, is a matter of such " complication that it is impracticable for a court of law to make " the exhaustive partition required. In other words, if the statute " is ultra vires as regards the first class of cases, it has to be " pronounced to be ultra vires altogether. Their Lordships agree " with Duff J. in his view that if the Act is inoperative as regards " brokers, agents and others, it is not possible for any court to " presume that the legislature intended to pass it in what may " prove to be a highly truncated form."

If these tests, especially that embodied in the last four lines, be applied, it is plain that section 8 is wholly void, notwithstanding that if the portion which relates to royalties reserved on coal from land leased by the Crown in right of the Province stood alone, it might be valid. If the latter provision stood alone and the rest were excised, the clause would be not only truncated but reduced to a shadow.

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[1] [1942] 1 W.W.R. 833.

[2] [1925] A.C. 561, 568.

Their Lordships have not been asked for a declaration as to the validity vel non of the five typical transactions but only for declarations (1) that section 8 of the Alberta statute does not apply, and (2) that it is ultra vires. Their Lordships are of opinion that it is ultra vires.

For these reasons their Lordships will humbly advise Her Majesty that the appeal should be dismissed, but that the order of the trial judge should be varied by substituting declaration (*b*) for declaration (*a*). The appellant must pay the costs of the appeal.

Solicitors: *Lawrence Jones & Co.; White & Leonard; Blake & Redden.*

ATTORNEY-GENERAL FOR CEYLON . . APPELLANT;

AND

A. D. SILVA . . . . RESPONDENT.

J. C.*
1953
May 12.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Ceylon — Crown servant — Contractual authority — Customs — Imperial Crown property—Erroneously treated as unclaimed—Sale by Principal Collector of Customs—No actual or ostensible authority—Whether Crown bound by statute by implication—Admission—Binding effect — Customs Ordinance (Legislative Enactments of Ceylon, 1938, *c.* 185), *ss.* 17, 22, 47, 108.

Crown property, consisting of certain naval war supplies—in particular, a quantity of steel plates—lying on customs premises in Ceylon, was advertised for sale by public auction on March 4, 1947, in the Government Gazette by the Principal Collector of Customs who, by mistake, had treated the goods as unclaimed and had obtained the sanction of the Chief Secretary to sell them. The basis on which the collector held the sale was that warehouse rent was due under section 17 of the Customs Ordinance on the goods, and

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* *Present*: Lord Porter, Lord Tucker, Lord Asquith of Bishopstone, and Mr. L. M. D. de Silva.

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that as they had been left on the customs premises for more than three months they were liable to be sold after public advertisement under section 108 of the Ordinance. Some weeks before the sale, however, an officer of the Services Disposal Board in Ceylon, who had been appointed by the Ministry of Supply in England, who had taken over the goods in November, 1946, had contracted on January 23, 1947, to sell the goods to a firm in Ceylon. At the auction sale the respondent had bought some steel plates and other goods, and on the refusal of the Principal Collector, on becoming aware of the earlier contract, to deliver the goods to him, the respondent claimed against the Attorney-General for Ceylon, as representing the Crown, damages for breach of contract:—

Held, that the Principal Collector of Customs had no authority, actual or ostensible, to enter into a contract binding on the Crown for the sale of the goods to the respondent. The Customs Ordinance was not made binding on the Crown by an express term in the Ordinance (section 3 of the Interpretation Ordinance), and there was nothing in the provisions of the Ordinance or in the schedules thereto from which it could be inferred that the Crown was bound by the Ordinance by necessary implication. The provisions of the Ordinance were therefore inapplicable to property belonging to the Crown, and the collector had no actual authority to sell the goods.

Further, a public officer has not by reason of the fact that he is in the service of the Crown the right to act for and on behalf of the Crown in all matters which concern the Crown; his right to act for the Crown in any particular matter must be established by reference to statute or otherwise. It had not been shown that the collector had any authority to sell property of the Crown or to enter into a contract on its behalf for its sale; nor had it been shown that the Chief Secretary, who authorized the sale, had any such authority; his functions were defined by the Ceylon (State Council) Order in Council, 1931, under which he was authorized at most to deal with certain Crown property under the direct administration of the Government of Ceylon. The collector had, therefore, on that basis also, no actual authority to enter into the contract for the sale of the goods.

Nor had he ostensible authority so to do. All "ostensible" authority involved a representation by the principal as to the extent of the agent's authority, and no representation by the agent as to the extent of his authority could amount to a "holding out" by the principal. No public officer, unless he possessed some special power, could hold out on behalf of the Crown that he had the right to enter into a contract in respect of the property of the Crown when in fact no such right existed. The act of the collector in advertising the goods for sale could not be said to be the act of the Crown, and nothing done by the collector or by the Chief Secretary amounted to a holding out by the Crown that the collector had the right to enter into a contract to sell the goods.

Lastly, even assuming that the property in the goods had passed to the Ceylon firm on January 23, 1947, and that no warehouse rent

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had been paid by the firm, still the collector would have had no right to sell the goods on March 4, 1947, because the period between those two dates was less than the three months prescribed by section 108 of the Ordinance as the period after which alone goods might be sold for the non-payment of rent. The sale to the firm would not therefore have altered the fact that the collector had no authority to sell the goods.

The judgment of the Supreme Court of Ceylon in favour of the respondent proceeded largely on the basis of an admission said to have been made on behalf of the Crown to the effect that section 17 of the Customs Ordinance applied to the Crown, but assuming that the Supreme Court had rightly understood the admission, the Board could not be bound on a question of law by an admission which, in their opinion, would involve an erroneous construction of the Ordinance.

Judgment of the Supreme Court of Ceylon reversed.

APPEAL (No. 46 of 1951) from a judgment and decree of the Supreme Court of Ceylon (May 31, 1951) setting aside a judgment and decree of the District Court of Colombo (May 24, 1949) whereby an action instituted by the respondent against the appellant (as representing the Crown in Ceylon) for the recovery of a sum of Rs. 40,000 as damages for breach of contract was dismissed.

The following facts are taken from the judgment of the Judicial Committee: In this case the plaintiff (respondent) sued the Attorney-General of Ceylon representing the Crown for damages which, according to him, were payable in respect of a breach of contract between himself and the Crown. His case was that by a notification in the Government Gazette of February 21, 1947, the Principal Collector of Customs acting for and on behalf of the Crown advertised certain goods for sale by public auction. He said that he purchased those goods at an auction on March 4, 1947, and that thereafter the Principal Collector wrongfully refused to deliver the goods although he had done everything necessary to entitle him to delivery. The defendant (appellant) pleaded, inter alia, that there had been no contract binding on the Crown and prayed that the action be dismissed.

Before February 21, 1947, the goods which were the subject-matter of this case, together with other goods belonging to various units of His Majesty's Forces, were lying on the customs premises. There was no doubt that they were Crown property. The units to which they belonged were not showing any interest in the goods which, by causing congestion and in other ways, inconvenienced the customs authorities. The full correspondence which passed between the Principal Collector, his superiors in the Government of Ceylon, and the different units of the Forces had not been produced, and what transpired in that correspondence was not altogether clear, but certain facts emerged with reasonable certainty. The Principal Collector described the goods as " unclaimed cargo " in the correspondence. The Flag Officer of Ceylon, on May 13, 1946, stated that certain steel plates, which constituted the greater part of the subject-matter of this action, were not " unclaimed cargo." Several attempts to get the Services to remove the goods proved unsuccessful, and on December 24, 1946, the Principal Collector obtained the sanction of the Chief Secretary to sell them. The sale by auction already referred to was accordingly held on March 4, 1947, and the plaintiff declared the purchaser. Meanwhile, the Ministry of Supply in Britain had appointed an officer of the Services Disposal Board, which was a local branch of the Ministry of Supply in England, to take charge, and dispose of the goods. That officer, after receiving offers from various people, contracted to sell the goods to Maharajan & Co. on January 23, 1947. The facts stated above were not in dispute.

In the courts below the District Judge held that no valid contract between the plaintiff and the Crown had been established and he dismissed the plaintiff's action. The Supreme Court (Dias S.P.J. and Gunasekara J.), on appeal, held that there had been a valid contract and awarded the plaintiff Rs. 40,000 by way of damages. The question before their Lordships of the Board was whether a contract binding on the Crown had been shown to have arisen.

1953. March 4, 5, 9, 10. *Paull Q.C.*, *Gahan Q.C.* and *Walter Jayawardena* for the appellant. The question is whether the Crown is liable for the damages which are claimed in this action. The District Court found that the Crown was not liable; but the Supreme Court reversed that decision, very largely, apparently, because of a so-called admission made by the Solicitor-General, the extent of which will have to be considered. There is no question here as to the amount of damages, if recoverable. Neither in the plaint nor in the issues was there any allegation that the Crown was estopped, or that there was any holding out by the Crown of the collector as being the agent of the Crown for the purpose of selling these goods. The only question, therefore, is, aye or no, did the collector have the authority as representing the Crown to sell these goods? The precise question is whether under the Customs Ordinance (Legislative Enactments of Ceylon, 1938, c. 185) there was a right given to the collector to deprive the Crown of title to the steel plates by selling to a third party.

The Interpretation Ordinance (Legislative Enactments, c. 2) provides by section 3 that "no enactment shall in any manner "affect the right of the Crown unless it is therein expressly "stated, or unless it appears by necessary implication that the "Crown is bound thereby." That has always been the rule of English law; so here the question is whether the Crown, not being stated in the Customs Ordinance to be bound by that Ordinance, is bound by it by necessary implication. Section 17 of that Ordinance, which makes warehouse rent payable in respect of goods left in customs warehouses, really gives no right to make any charge for rent against the Crown's own goods lying in the Crown's warehouse. That would have to be either stated or be a necessary implication, and it is submitted that it is neither. It is clear that looking at the Crown qua Crown no one had any right to levy execution against these goods. The regulations made under section 17, which provide for the levying of warehouse rent in respect of all goods irrespective of whether they are public or private property, cannot go beyond the statute, and that being so, unless there is something in section 17 which gives the legal right to charge the Crown rent, the regulations cannot achieve that object. The customs' right to sell is statutory or not at all.

With regard to the extent of the Solicitor-General's admission in the courts below, all the way through he was maintaining stoutly that section 108 of the Customs Ordinance, which authorizes the sale of goods left for more than three months in customs warehouses to meet the charges due thereon, did not apply to these goods. His admission that under section 17 rent was due did not mean that thereby an action might be brought against the Crown and judgment obtained for the rent. The real question is not whether section 17 applies, but even if it does, whether that gives any right of action or not. Whatever may be the position under section 17 and regulation 5, they give no power to the customs authorities to levy execution on the goods of the Crown. The problem is whether there is power under the Ordinance to levy execution against the goods of the Crown. The Solicitor-General all the way through was saying that whatever might be the position under section 17, under section 108 there was no power to levy this execution against the Crown. [Reference was made to Phipson on Evidence, 9th ed., p. 235, on

"Matters provable by admissions."] Even conceding that warehouse rent was payable by the Crown, there is no statutory provision, certainly not section 108, which permits the compulsory sale of goods belonging to the Crown to satisfy unpaid rent.

On the question whether there was actual authority to sell these goods—no question of ostensible authority was raised or argued below—one starts with the undoubted fact that the Principal Collector of Customs is a civil servant, paid by the Crown to carry out certain duties and to exercise certain rights. The precise duties and rights are governed by Ordinances and any regulations properly made under those Ordinances. There is no right under any Act unless in fact given to him by the statute; it limits his authority on behalf of the Crown. The Ordinances and regulations are public law, and therefore anyone dealing with the collector in his official capacity must be deemed to be aware of his duties and the limits placed upon his rights by the Ordinances. The very basis of the transaction is the authority given by the Ordinance. If the authority does not exist the whole transaction goes: *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah*,[1] where it was said that "the acts of a government officer bind the "government only when he is acting in the discharge of a certain "duty within the limits of his authority, or, if he exceed that "authority, when the government in fact, or in law, directly, or "by implication, ratifies the excess." Here, if the collector had no authority to enter into the contract of sale, the Crown is not bound by that contract. The *Masulipatam* case [1] was referred to in *Attorney-General* v. *Wijesuriya*,[2] which latter case was affirmed on appeal to the Privy Council.[3] Unless, therefore, it appears that the agent alleged to be acting for the Crown was within the authority, the contract is not one by which the Crown is bound.

The general proposition is stated in *Russo-Chinese Bank* v. *Li Yau Sam* [4]: "It is undoubted that a person who deals with "an agent, whose authority he knows to be limited . . . does "so at his peril, in this sense, that should the agent be found "to have exceeded his authority his principal cannot be made "responsible." There is no apparent authority on behalf of the Crown to go outside the authority. Although *Tobin* v. *The Queen* [5] was a case of tort, the court there pointed out that a man who acts by statutory authority is bound by the statute.

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[1] (1861) 8 Moo.I.A. 529, 554.

[2] (1946) 47 C.N.L.R. 385, 392.

[3] [1950] A.C. 493.

[4] [1910] A.C. 174, 184.

[5] (1864) 16 C.B. (N.S.) 310, 347.

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The real problem is whether under section 108 of the Ordinance the collector had a right to affect the Crown's title to the goods by a sale. There is no power in the collector under that section to sell unless two conditions have each been fulfilled: (i) there is a legal debt enforceable by action against somebody; (ii) there is a right to levy execution in respect of that debt. That there must be a legal debt enforceable by action follows from the fact that in section 108 the actual words are: "shall . . . be sold by "auction to answer . . . warehouse rent . . ." It is under that head that the question arises as to the effect of section 17, which, it is submitted, does not, certainly not expressly, and not by necessary implication, render the Crown liable to an action in respect of rent. There was therefore no authority to sell. The question of holding out has not been raised here, and in any case there cannot be a holding out if the terms of the authority are statutory and the officer is acting under statutory authority.

Even assuming, however, that there is a legal debt and that there can be an action against someone, the question is against whom, and the answer must be the Crown, and it must be the Crown in right of the United Kingdom. That is difficult enough to conceive, but even assuming that such an action can be brought and judgment obtained, one is dead up against the doctrine that execution does not pursue against the Crown: Chitty's Prerogatives of the Crown (1820), p. 376; the Crown Proceedings Act, 1947, s. 4; *Secretary of State for War* v. *Wynne.*[6] The general principle is that goods belonging to the Crown are not liable to execution. Section 108 is a form of execution, and to give the right to execution there would have to be words in that section giving the right expressly or by necessary implication. In section 108 the right to sell is given generally, but not against the Crown.

As to the position of the Chief Secretary, the Ceylon (State Council) Order in Council of March 20, 1931, defines his functions, but it does not touch the right of the Crown in right of the United Kingdom, and he is not even in charge of the customs; the person who is is the Financial Secretary. The respondent's remedy, if any, was by action against the Principal Collector under the procedure laid down by sections 148, 149 and 150 of the Customs Ordinance.

Quass Q.C., *Handoo* and *Carl Jayasinghe* for the respondent. The rights of the subject have not been affected and this respondent has the right to recover damages. He had no knowledge whatever that the goods were Crown goods, if they were Crown goods. Under the local Sale of Goods Ordinance, which in this respect is identical with the English Sale of Goods Act, a seller warrants to the buyer that he has a good title to sell the goods, and accordingly he must deliver the goods and make good that warranty or pay damages. It is admitted for the appellant that the respondent had no knowledge, and could have no knowledge, of the facts on which the appellant relied to defeat the respondent's claim to recover damages. If the English Ministry of Supply was the owner of the goods, it seems clear that nobody in Ceylon was told so at the material time.

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[6] [1905] 2 K.B. 845.

The position with which the customs authorities were faced was that they had in their possession certain goods which had originally belonged to one or other of His Majesty's Services, and it would seem that at the material time none of those Forces wished to collect these goods, or, indeed, it is submitted, desired to take delivery of them. Before the sale to the respondent was effected in March, 1947, the customs officers made all reasonable inquiries to ascertain whether the goods were claimed by anybody. Not only did they make such inquiries, but in addition, before the sale took place, they asked the chief executive officer—the Chief Secretary of Ceylon—for his advice as to what should be done in regard to the goods. The Chief Secretary expressly authorized the sale of these very goods. It is a little surprising in those circumstances that the Government of Ceylon should take up the attitude, wrongly, it is submitted, of disowning that authority and saying that the sale was held without any authority from those in a position to give it. It was said for the appellant that the collector had no authority to sell Crown goods. That is not accepted. The Crown is indivisible, and there must be somebody who is authorized to sell these goods in Ceylon. The subject should not be drawn into a dispute between the interests of the different government departments.

The question of ostensible authority was raised and argued in the courts below, and it is not therefore right to say that it was not. This case was fought on (i) actual authority, and (ii) ostensible authority. The question that the property at the time of the sale belonged to Maharajan & Co. was taken by counsel for the plaintiff in the trial court. As to the concession by the Solicitor-General, there can be no doubt that the concession went the whole way and showed that the Solicitor-General was agreeing in terms that there was warehouse rent due as a matter of law under section 17. It is impossible to attack that concession; whether

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it binds the appellant is another matter. The concession was rightly made, and the Crown should not now resile from it; the rent was due. Starting on that basis, that section 17 did entitle rent to be charged, the task under section 108 is much lighter; a great deal of the Supreme Court judgment is based on that concession. Section 3 of the Interpretation Ordinance is much more limited than the English common law, which is that the Crown is not affected by statute. Reading section 17 of the Customs Ordinance and section 3 of the Interpretation Ordinance together, there is nothing to stop Crown goods being liable for rent. The words of section 3 do not say that there is the suggested right of the Crown to have their goods stored free of warehouse rent. Section 47 of the Customs Ordinance reinforces that submission.

It was said for the appellant that section 108 has no application because the powers in that section must be limited to debts which are enforceable by action. But there is nothing in the section to say that that is so, and there is nothing to justify that deduction at all. One would have thought, indeed, that the section was designed to cover cases where, in practice at any rate, the debt was not enforceable by action. It was next said that this was a form or process of execution, and that there cannot be execution against the Crown. There again, that is introducing something which is not in the section. In *Secretary of State for War* v. *Wynne*,[7] which was referred to for the appellant, it was also said: "They were entitled to exercise their common law right to distrain "for rent the goods of another upon the land occupied by the "tenant, and after the sale had taken place the Crown could not "enforce any claim to the goods sold." That case, however, was dealt with entirely on the basis of the common law position as regards distress and the common law rights of the Crown; it does not assist the appellant, and is certainly no authority against the respondent in dealing with the interpretation of a statute in Ceylon. In Ceylon the Crown can be sued in contract: *Hettihewage Siman Appu* v. *Queen's Advocate*[8]; *Colombo Electric Tramway Co.* v. *Attorney-General.*[9] On the question whether the Crown can sue itself, it was said in *State of South Australia* v. *State of Victoria*[10] that "if the British Government, by one "of His Majesty's ministers, were to enter into possession of a "portion of the South Australian public lands, contrary to South

[7] [1905] 2 K.B. 845, 847.
[8] (1884) 9 App.Cas. 571, 585.
[9] (1913) 16 C.N.L.R. 161.
[10] (1911) 12 C.L.R. 667, 711.

" Australian laws, His Majesty's minister would be liable to be " dispossessed by writ of intrusion at the suit of the State of South " Australia, just as any other intruder would be liable."

With regard to the question of agency, the Crown, of course, can only act through its executive officers. Here the Government, in their position as principals, advertised these goods for sale by one of their officers, and the respondent bought at that sale; that in itself, it is submitted, is sufficient to justify him in requiring that the Government should carry out its obligation to deliver to him the goods or pay damages for failure to do so. Ostensible authority is the only thing that matters so far as regards the relationship between principals and third parties. The law of principal and agent is the same in Ceylon as it is in England; that is specifically provided by section 3 of the Civil Law Ordinance (Laws of Ceylon, 1938 rev., c. 66); Sale of Goods Ordinance, c. 70, s. 58 (2). It cannot be right that the third party must show the actual relationship between the principal and the agent. The leading decision on this branch of the law is the judgment of Lord Ellenborough in *Pickering* v. *Busk*.[11] The advertisement was inserted on the express authority of the Chief Secretary. The public had no idea of the fact, if it were the fact, that those goods could not be sold by the collector. All that the respondent is concerned with is whether the collector had a right to enter into the contract of sale. On the admitted facts of this case it is abundantly clear that, in entering into the contract with the respondent, the collector acted throughout for and on behalf of the Crown in good faith and within the scope of his authority.

The authorities do not support the appellant's, but the respondent's, case. The *Russo-Chinese Bank* case [12] does not help the appellant; the inference from that case is that the plaintiff knew that the comprador had no authority to enter into the transaction without the express approval of the bank manager. It was said in the *Masulipatam* case [13] that " the collector in this case had " certainly no authority to waive the rights to which government " might become entitled by the escheat; nor were his acts, when " fairly reviewed, calculated to give rise to the supposition that " he had such an authority." The important words there are " nor were his acts, when fairly reviewed." That case does not assist the appellant. *Wijesuriya* v. *Attorney-General for Ceylon* [14] is again inferentially an authority that the Crown is liable just as much as a private individual would be for his agent being held out as his apparent agent; again the case does not help the appellant.

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[11] (1812) 15 East 38, 43.

[13] [1910] A.C. 174.

[13] 8 Moo.I.A. 529, 554.

[14] [1950] A.C. 493, 504–5.

As to the position of the collector, in one sense, of course, it is immaterial whether the respondent could have sued the collector, and this case should not be dealt with on the basis that he might have a remedy against the collector. [Reference was made to *Singer Sewing Machine Co.* v. *Bowes*,[15] *Muttupilla* v. *Bowes*,[16] *Dunn* v. *The Queen*[17] and *Dunn* v. *MacDonald*.[18]] It is conceded that if the respondent fails against the Crown the position in law is that he has no remedy against anybody. With regard to the Chief Secretary, a government can only act through its executive officers, and for the position of the Chief Secretary at the material time one has to look at the Ceylon (State Council) Order in Council of 1931; at least his powers were as great as those of a flag officer.

The real question is whether the action lies against the Crown for breach of a contract by the collector acting within his ostensible authority, and the answer is obviously, "Yes." The books on agency say that the only thing that matters so far as the third party is concerned is "ostensible authority": Hanbury on The Principles of Agency, 1952 ed., pp. 13, 112; Anson's Law of Contract (1952), 20th ed., pp. 386 et seq. The appellant based his case on the submission that section 108 gives no right to sue. This Board would not be inclined to allow counsel to resile from the concession made by the Solicitor-General in Ceylon, and on which the Supreme Court partly based its judgment. That concession was rightly made. The Crown is bound by section 108. The Board should deal with this case from the point of view of ostensible authority; there was ostensible authority in the collector to sell the goods. In Ceylon the Crown is liable for the breach of a contract entered into by its agents or servants, and this action was therefore properly instituted against the appellant. The goods were rightly regarded by the collector as liable to be sold when warehouse rent in respect of them remained unpaid for more than the prescribed period, and the fact that they were Service goods did not affect the liability.

The respondent went as far as any subject could possibly be expected to go to show that so far as the advertisement was concerned in fact there was actual authority. He showed that

[15] (1917) 4 C.W.R. 78.

[16] (1914) 17 C.N.L.R. 453.

[17] [1896] 1 Q.B. 116.

[18] [1897] 1 Q.B. 401, 555.

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this sale was made under the express authority of the Chief Secretary; it could not be suggested that the Chief Secretary had no authority. The subject here was entitled to damages for breach of the contract entered into by a government servant.

Paull Q.C. in reply. Nowhere is there the slightest evidence that anybody abandoned these goods in any shape or form. Nowhere in the plaint, in the issues or in the respondent's case is there any suggestion of ostensible authority—a holding out owing to some act of the Chief Secretary. The limit of the authority given to the collector is laid down by section 108, and he purports to sell under that. That being so, the person purchasing may not know that the conditions have not been fulfilled, but if he knows that there is some limitation, and here he clearly must know, because the collector has certain statutory rights and liabilities, it matters not whether he knows that the particular incident is one within or without the statute, he risks that, and if it should be without the statute then the person has no complaint and cannot sue the Crown in this case: *Grant* v. *Norway.*[19] That case was approved in the *Russo-Chinese Bank* case,[20] where it was said: "In other words, if the agent be held out as having "only a limited authority to do on behalf of his principal acts "of a particular class, then the principal is not bound by an act "done outside that authority, even though it be an act of that "particular class, because, the authority being thus represented "to be limited, the party prejudiced has notice, and should "ascertain whether or not the act is authorized." No statute can give ostensible authority; it can only give actual authority within the wording of the statute. If that approach be right, then this case comes down to whether the statute gave authority to sell in the particular circumstances of this case—nothing more and nothing less. If the argument for the respondent is right, the whole of the Customs Ordinance applies to the Crown, and the Crown would be liable for customs duties, which, it is submitted, just cannot follow. A statute intended to bind the Crown would not be drafted as was that Ordinance.

On the question whether the Crown is bound by necessary implication, see *Province of Bombay* v. *Municipal Corporation of Bombay.*[21] There is in this Ordinance no power given to affect the title of the Crown by sale of goods purporting to levy execution. Section 47 assists the appellant greatly; it is a procedural section stating that a certificate given in a certain form shall be sufficient, and that is all. If the respondent is right one would expect section 47 to be in very different terms. If it was intended that the Ordinance should bind the Crown it would have said so expressly; it does not do so. The mere fact that goods are left on customs premises gives no authority to the Chief Secretary to sell the goods; there is no authority whereby he may dispose of Crown goods.

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[19] (1851) 10 C.B. 665, 667, 686.

[20] [1910] A.C. 174, 184.

[21] [1947] A.C. 58, 61.

May 12. The judgment of their Lordships was delivered by MR. L. M. D. DE SILVA, who stated the facts set out above and continued:—It is necessary to refer to a letter of November 28, 1946, in which the Principal Collector, writing to the Chief Secretary, made the observation "Presumably the goods have "been abandoned." On the strength of this it was sought to argue before their Lordships that the Crown had abandoned the goods. This point was not canvassed in the courts below and has not even been raised in the printed case for the plaintiff. Upon the meagre material before them their Lordships cannot take any view other than that taken by the parties in the courts below and by the courts themselves, namely, that the property was the property of the Crown until, at any rate, the sale to Maharajan & Co.

The precise question which arises for their Lordships' decision is whether the Principal Collector of Customs had authority to enter into a contract binding on the Crown for the sale of the goods in question to the plaintiff. This question can conveniently be dealt with under two heads: had the Principal Collector actual authority to enter into a contract; if not, did he have ostensible authority to do so?

It is argued that the Principal Collector had actual authority to enter into the contract by reason of the provisions of sections 17 and 108 of the Customs Ordinance (chapter 185, Legislative Enactments of Ceylon). Section 17 makes warehouse rent payable in respect of goods left in customs warehouses. It reads: "On all goods lodged in any King's warehouse, warehouse, or "place of deposit provided by Government, it shall be lawful for "the collector to charge, demand, and receive warehouse rent "for all such time as the same shall remain in such warehouse, "at such rates and under such regulations as may from time to "time be fixed by the Governor, as warehouse rent payable on "goods so lodged, and no goods upon which warehouse rent may "be due shall be removed until the same shall be paid."

Section 108 authorizes the sale of goods left for more than three months in customs warehouses "to answer" the charges due thereon. It reads: "All goods left in any King's warehouse "or on the customs premises for a longer period than three "months, unless permitted to remain by the special permission "of the collector, shall, after public advertisement, be sold by "auction to answer the duties, warehouse rent, or other charges "due thereon, and any overplus shall be paid, if claimed within "12 months from the date of sale, to the owner of such goods, "who shall have no further claim touching the same, but if "there be no claimant such overplus shall be brought to account "as revenue."

It is claimed by the plaintiff that the Customs Ordinance was binding on the Crown, that warehouse rent was due under section 17 of the Ordinance on the goods in question, and that as they had been left on the customs premises for a period longer than three months, they were liable to be sold after public advertisement under section 108. This was in fact the basis on which the Principal Collector held the sale, and it would without doubt have been a sound basis if the property had all the time been private property. But it is argued by the Crown that, no matter what the Principal Collector thought or did, the Customs Ordinance was not binding on the Crown; that it, or at any rate the provisions in it relevant to this case, were inapplicable to property belonging to the Crown and that therefore the plaintiff's contention fails.

The first matter which arises for consideration is whether the Ordinance binds the Crown. Under section 3 of the Interpretation Ordinance (chapter 2, Legislative Enactments of Ceylon): "No enactment shall in any manner affect the right of the Crown "unless it is therein expressly stated, or unless it appears by "necessary implication that the Crown is bound thereby." It is not expressly stated in the Customs Ordinance that the Crown is to be bound thereby, and therefore the question which arises is whether the Crown is bound by necessary implication.

Certain sections of the Ordinance and certain items in the schedules thereof are relied on by the plaintiff as giving rise to such an implication. Two sections of the Ordinance are relied on as giving rise to the implication that the Customs Ordinance binds the Crown, namely, sections 22 and 47. It has to be remembered that the Ordinance relates to customs, and that it would be remarkable if its provisions, particularly those relating to the payment of dues and charges, were applicable to the

Crown as this involves ex facie a liability on the Crown to pay itself. Section 22 reads: "(1) The following articles shall be "exempted from payment of import duties and export duties:— "(*a*) articles of every description imported or exported for the "public use of His Majesty's Regular Naval, Military and Air "Forces in Ceylon, and all articles sold for the public use of His "Majesty's Regular Naval, Military and Air Forces in Ceylon, "though not directly imported for that purpose; (*b*) all wines, "spirits and stores which are imported or purchased or procured "locally for the use of the Naval Commander-in-Chief when "residing in the Island, or which are supplied from His Majesty's "dockyard at Trincomalee for the use of his servants and of the "sailors on duty at his place of residence; (*c*) articles, clothing "and materials for clothing imported for the use in athletic "sports and games of His Majesty's Regular Naval, Military and "Air Forces in Ceylon; (*d*) articles imported, purchased, or procured or exported for the use of any mess or canteen of His "Majesty's Regular Naval, Military and Air Forces in Ceylon."

It will be seen that paragraph (*a*) is applicable to all articles to be put to "public use" by Her Majesty's Regular Forces. It extends to articles not directly imported for the purpose. Paragraphs (*c*) and (*d*) are applicable to certain specified articles which are to be put by the Forces to what may be described as "private use" (for example, in sports and games) by way of contrast to "public use" in paragraph (*a*). Paragraph (*b*) is applicable to certain specified articles to be used by the Naval Commander-in-Chief, his servants and sailors on duty at his residence.

The language of the section, when looked at independently of other considerations, is applicable to articles imported by the Crown and also to those which are imported by private dealers and others. It has to be noted in this connexion that articles "supplied from His Majesty's dockyard" are not necessarily articles imported by the Crown.

The ground on which it is contended that the Ordinance generally is applicable to the Crown is that the legislature has expressly made certain specific exemptions in favour of the Crown and thereby by implication negatived the general exemption from the provisions of the Ordinance which it would otherwise have had. It is said that such exemptions would have been unnecessary if the Crown had not been bound by the Ordinance as a whole, and that the implication that arises therefrom is that the Crown is bound except where exemptions are

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expressly conferred on it. Their Lordships are of opinion that upon a correct view of section 22 it confers no exemption on the Crown and therefore does not imply, necessarily, or at all, a liability which would exist but for such exemption. The language of section 22 must be looked at in the light of the fact that the Crown enjoys immunity normally from statutory provisions. Their Lordships are of opinion that every word of the section possesses significance, and is effective in respect of articles imported or exported by private persons, and only in that respect. Articles imported or exported by the Crown enjoy exemption from duty under the general immunity of the Crown. There is nothing in the section which compels the view that it confers an exemption on the Crown.

Again it has been argued that section 47 (relating to port dues) confers certain exemptions on the Crown. It reads: " 47.—(1) " All articles:—(*a*) consigned to any officer of a public department " in Ceylon and being the property of the Crown; or (*b*) consigned " to any person for the purpose of being delivered to any officer " of a public department for the use or service of the Crown; or " (*c*) purchased out of bond by any officer of a public department " for the use or service of the Crown; shall be passed duty free " on any such public officer delivering to the collector a list of " the articles and certifying at the foot thereof that such articles " are the property of the Crown or have been consigned to some " person named in the certificate for the use or service of the " Crown, or have been purchased out of bond for the use or " service of the Crown.

" (2) All such articles passed duty free as aforesaid shall, in " case of the sale thereof, be liable to and be charged with such " and the same duties of customs as may by law be payable or " charged on the like articles not exempted from duties of " customs under this section, and the officer of the public department in whose charge such goods may be shall furnish the " collector with the particulars of the sale thereof, and out of the " proceeds of the same pay to the said collector the duties which " may be due thereon."

Paragraph (*a*) relates clearly to the property of the Crown, but the effect of the section is merely to provide a convenient, but not exclusive, procedure by way of a certificate whereby a public officer to whom Crown property is consigned can assert the immunity from duty which it enjoys. Its effect is limited to this. Paragraphs (*b*) and (*c*) provide a convenient procedure by way of a certificate whereby a public officer may in certain circumstances

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obtain free of duty articles which are not the property of the Crown for "the use or service of the Crown." The language of paragraph (*b*), unlike the language of paragraph (*c*), is wide enough to apply to the property of the Crown. Their Lordships are of opinion that the effect of paragraph (*b*) in its application to the property of the Crown is not to grant exemption to the Crown, but merely to provide a convenient procedure similar to that provided by paragraph (*a*) whereby the Crown can assert the immunity from duty which it enjoys. There is nothing in subsection (2) which makes it necessary to qualify what has been said. The duties recoverable under the subsection are recoverable from the subject and not from the Crown.

Certain items in the schedules to the Ordinance have also been relied on in support of the argument just discussed. Schedule A specifies the import duties payable on various articles, and in the table of exemptions there is the item "regimental "clothing, arms and accoutrements imported for His Majesty's "land and sea forces including the Ceylon Defence Force." Schedule C prescribes the "Dues leviable at the Port of "Colombo," and exempts from "entering" dues (1.vii) and "over-hour and buoy rent charges" (4.iv): "men of war, "vessels of the imperial light service, troopships, hospital ships, "and royal fleet auxiliaries belonging to the admiralty or on "admiralty charter which normally fly the blue ensign with "admiralty badge and carry no cargo on which freight is paid, "and private yachts."

It also contains provision (5.iii) to the effect that: "men of "war, troopships, hospital ships, and royal fleet auxiliaries "belonging to the admiralty or on admiralty charter, which "normally fly the blue ensign with admiralty badge and carry "no cargo on which freight is paid shall be exempt from tonnage "dues in respect of any cargo discharged or loaded which is "exempt from duty under sections 22 and 23 of the Customs "Ordinance."

In the same schedule "government cargo" is exempted from first harbour dues on imported (7.i) and exported (10.i) goods. In Part II of the same schedule, dealing with ports other than Colombo, exemption from port dues is conferred on "any private "yacht, vessel of the imperial light service, man-of-war, troop-"ship, hospital ship or royal fleet auxiliary, belonging to the "admiralty or on admiralty charter, normally flying the blue "ensign with admiralty badge and carrying no cargo on which "freight is payable."

The charging section under which customs duties are levied is section 9, which enacts: "The several duties of customs, as "the same are respectively inserted, described, and set forth in "figures in the table of duties (schedule A) shall be levied and "paid upon all goods, wares, and merchandise imported into "this Island." It goes on: "Provided that (*a*) the State "Council may from time to time, by means of a resolution duly "passed at any public session of the council and sanctioned by "the governor, increase, reduce, abolish, or otherwise alter the "customs duty leviable on any goods imported into or exported "from the Island or into or from any specified port therein, or "subject to such terms or conditions, if any, as may be expressed "in the said resolution, may impose customs duty upon any "goods so imported or exported whereon customs duty at the "time when such resolution is passed is not leviable; or may "add other goods to the goods enumerated in the said schedule "as exempt from customs duty; or may add to, rescind, or vary "any of the conditions, exceptions, or provisions of the said "schedule with regard to the payment of customs duty; (*b*) no "such resolution shall take effect unless it shall have been "submitted to and sanctioned by the Secretary of State, and "such sanction shall have been notified in the Government "Gazette."

A similar proviso exists (section 25 (2)) in respect of schedule C. The items in the schedules are thus seen to be capable of alteration by subsidiary legislation. Such legislation would no doubt indicate the view of the statute taken by the authority to whom subsidiary legislative power has been delegated. But the terms of such legislation made under a statute cannot serve to determine the meaning of the statute itself. Their Lordships have not in the course of the argument been made aware whether or not the items relied on were introduced into the schedules by subsequent subsidiary legislation. But they do not think it necessary to investigate this matter, because they are of opinion that, in any case, the implications that arise from the items of the schedules referred to above are not strong enough to oust the applicability of the general principle that the Crown is not bound by the statute. Their Lordships do not think it necessary to say anything more about them except, perhaps, that they appear to be largely concerned with provisions for the regulation of business between government departments which do not need the force of law for their proper execution.

Their Lordships, therefore, are of opinion that the Ordinance does not bind the Crown. It has been argued that apart from the Ordinance the Principal Collector has actual authority to do what he did, and that this authority was reinforced by the letter written to him by the Chief Secretary. It is a simple and clear proposition that a public officer has not by reason of the fact that he is in the service of the Crown the right to act for and on behalf of the Crown in all matters which concern the Crown. The right to act for the Crown in any particular matter must be established by reference to statute or otherwise. It has not been shown that the Principal Collector had any authority to sell property of the Crown or to enter into a contract on its behalf for its sale: nor has it been shown that the Chief Secretary, who authorized the sale, had any such authority. His functions were defined by the Ceylon (State Council) Order in Council, 1931, and under this Order the most that can be said is that he was authorized to deal with certain Crown property under the direct administration of the Government of Ceylon. It is therefore clear that the Principal Collector of Customs had no actual authority to enter into a contract for the sale of the goods which are the subject-matter of this action.

Next comes the question whether the Principal Collector of Customs had ostensible authority, such as would bind the Crown, to enter into the contract sued on. All " ostensible " authority involves a representation by the principal as to the extent of the agent's authority. No representation by the agent as to the extent of his authority can amount to a " holding out " by the principal. No public officer, unless he possesses some special power, can hold out on behalf of the Crown that he or some other public officer has the right to enter into a contract in respect of the property of the Crown when in fact no such right exists. Their Lordships think, therefore, that nothing done by the Principal Collector or the Chief Secretary amounted to a holding out by the Crown that the Principal Collector had the right to enter into a contract to sell the goods which are the subject-matter of this action. It is not necessary to consider whether the Ministry of Supply or the Disposals Board could have held out the Principal Collector as having such a right because they did nothing from which a " holding out " can be inferred.

In advertising the goods for sale the Principal Collector no doubt represented to the public that the goods were saleable.

But the question is whether this act of the Principal Collector can be said to be an act of the Crown. Their Lordships have considered whether by reason of the fact that the Principal Collector had been appointed to his office under the Customs Ordinance, and was the proper officer to administer it, he must be regarded as having had ostensible authority on behalf of the Crown to represent to the public that goods advertised for sale under the Customs Ordinance were in fact saleable under that Ordinance. It is argued that, if so, although the goods were in fact not saleable under the Ordinance because they were Crown property, or property to which the sections of the Ordinance authorizing sale were not applicable, or for some other reason, the contract would be binding on the Crown and the Crown would be liable in damages as it could not fulfil it.

Their Lordships think that the Principal Collector cannot be regarded as having any such authority. He had, no doubt, authority to do acts of a particular class, namely, to enter on behalf of the Crown into sales of certain goods. But that authority was limited because it arose under certain sections of the Ordinance and only when those sections were applicable. It was said by Lord Atkinson in *Russo-Chinese Bank* v. *Li Yau Sam* [1]: " If the agent be held out as having only a limited " authority to do on behalf of his principal acts of a particular " class, then the principal is not bound by an act done outside " that authority, even though it be an act of that particular class, " because, the authority being thus represented to be limited, " the party prejudiced has notice, and should ascertain whether " or not the act is authorized." With that view their Lordships respectfully agree. In that case the authority did not arise under a statute, but in their Lordships' view this fact makes no difference. If there is a difference at all it would lie in the circumstance that in a statute the limits of the authority conferred are fixed rigidly and no recourse to evidence is necessary to ascertain them. The Ordinance could no doubt have made the representation by the Principal Collector binding on the Crown, but it has not done so, and to read into it any such provision would be unduly to extend its meaning.

It may be said that it causes hardship to a purchaser at a sale under the Customs Ordinance if the burden of ascertaining whether or not the Principal Collector has authority to enter into the sale is placed upon him. This undoubtedly is true. But where, as in the case of the Customs Ordinance, the Ordinance does not dispense with that necessity, to hold otherwise would be to hold that public officers had dispensing powers because they then could by unauthorized acts nullify or extend the provisions of the Ordinance. Of the two evils this would be the greater one. This is illustrated in the case under consideration. The subject derives benefits, sometimes direct, sometimes indirect, from property vested in the Crown, and its proper protection is necessary in the interests of the subject even though it may cause hardship to an individual.

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[1] [1910] A.C. 174, 184; 26 T.L.R. 203.

The goods which are the subject-matter of this action have been treated so far without reference to the sale to Maharajan & Co. on January 23, 1947. The date on which the property passed from the Crown to Maharajan & Co. cannot be gathered with confidence from the evidence, and there is no evidence that Maharajan & Co. did not pay or offer to pay warehouse rent. But even if property passed on January 23, 1947 (it could not have passed earlier) and no warehouse rent was paid by Maharajan & Co., still the Principal Collector had no right to sell the goods on March 4, 1947, because the period between those two dates falls short of the three months prescribed by section 108 as the period after which alone goods may be sold for the non-payment of warehouse rent. The sale to Maharajan & Co. does not therefore alter the fact that the Principal Collector had no authority to sell the goods.

Their Lordships wish to observe in passing that no argument was addressed to them on the contention raised in the case for the appellant that "although the Principal Collector is a servant of "the Crown, acts done in performing a statutory duty are done "by him not as servant of the Crown but as the officer designated "by the statute." In view of the conclusion at which they have arrived they do not, for the purposes of a decision on this case, find it necessary to examine it.

The judgment of the Supreme Court proceeded largely on the basis of an admission said to have been made by the Solicitor-General to the effect that section 17 of the Customs Ordinance applies to the Crown. Before the Board there was some discussion as to the extent of the Solicitor-General's admission. Assuming, however, that the Supreme Court rightly understood the admission, their Lordships cannot be bound on a question of law by an admission which, in their opinion, would involve an erroneous construction of the Ordinance. Their Lordships will therefore humbly advise Her Majesty that the appeal be allowed, the decree of the Supreme Court be set aside and the decree of the District Court restored. Each party must bear its own costs both on this appeal and in the Supreme Court of Ceylon.

Solicitors: *Burchells; T. L. Wilson & Co.*

[HOUSE OF LORDS.]

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Feb. 5, 9, 10, 11, 12; *Mar.* 9.

UNION CORPORATION LD. . . . . Appellant;
AND
INLAND REVENUE COMMISSIONERS . Respondents.

JOHANNESBURG CONSOLIDATED INVESTMENT CO. LD. . . . . . . Appellant;
AND
SAME . . . . Respondents.

TRINIDAD LEASEHOLDS LD. . . . Appellant;
AND
SAME . . . . Respondents.

Revenue—Profits tax—Residence—Companies resident both in United Kingdom and abroad—Whether "ordinarily resident outside the "United Kingdom"—Test of dual residence—Control and management—Finance Act, 1947 (10 *&* 11 *Geo.* 6, *c.* 35), *s.* 39 (1).

Companies resident both inside and outside the United Kingdom cannot claim the relief from profits tax liability afforded by section 39 (1) of the Finance Act, 1947, to companies resident outside the United Kingdom, for the words "ordinarily resident outside the "United Kingdom" in that section mean exclusively so resident.

Decisions of the Court of Appeal [1952] 1 T.L.R. 651; [1952] 1 All E.R. 646; [1952] W.N. 119, affirmed.

Appeals from decisions of the Court of Appeal (Evershed M.R., Jenkins and Hodson L.JJ.).

These were appeals from orders of the Court of Appeal dated February 22, 1952, dismissing appeals by the appellants, Union

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* *Present*: Lord Normand, Lord Oaksey, Lord Morton of Henryton, Lord Reid and Lord Cohen.

Corporation Ld., Johannesburg Consolidated Investment Co. Ld. and Trinidad Leaseholds Ld., from orders of the Chancery Division of the High Court (Harman J.) dated July 20, 1951, whereby appeals by the appellants from a determination of the Commissioners for the Special Purposes of the Income Tax Acts, on a case stated by those Commissioners, were dismissed and the determination of the Commissioners was affirmed. The question related to liability to profits tax under Part IV of the Finance Act, 1947.

The three appellant companies appealed against assessments to profits tax for the two chargeable accounting periods ending December 31, 1947, and December 31, 1948.

Union Corporation Ld. was incorporated in the former South African Republic (now Transvaal Province) in 1897 for the purpose of acquiring the business and interests in various mining and other companies. It controlled sixteen subsidiary companies, thirteen of which were incorporated in South Africa and managed by it from Johannesburg, where its registered office was. Three of the subsidiaries were incorporated elsewhere and managed from London, where it also had an office. It carried on other activities in South Africa. More than two-thirds of its staff was in South Africa. A minority of the board of directors resided there, and meetings of the board or committees of the board took place there, but on matters of policy affecting the company's affairs the supremacy rested with the board in London.

Johannesburg Consolidated Investment Co. Ld. was incorporated in the former South African Republic in 1889. Its memorandum and articles of association provided that its objects were to carry out mining operations in Africa. Its registered office was in Johannesburg and it also had an office in London. Five of the directors resided in South Africa and five in the United Kingdom. The company's activities were largly controlled from London.

Trinidad Leaseholds Ld. was incorporated in England but carried on business principally in Trinidad. All its eight directors and the secretary resided in England, where all formal board meetings took place as well as the general meetings of the company. Its operations in Trinidad were in charge of a manager, who, under a power of attorney from the board of directors, had very wide powers and responsibilities. The chairman, managing director and other directors often visited Trinidad to exercise their supervision and a large measure of control over the policy and

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general affairs of the company. Important decisions were taken by members of the board when they were there.

The three companies were admittedly ordinarily resident in the United Kingdom, but they contended that they were also ordinarily resident outside the United Kingdom and that in section 39 (1) of the Finance Act, 1947,[1] the expression " a person " ordinarily resident outside the United Kingdom " meant in the context a person not ordinarily resident in the United Kingdom.

Tucker Q.C., *Mustoe Q.C.* and *Robert Phillips* for the first two appellant companies. The word " person " in section 39 (1) and (3) of the Finance Act, 1947, must be construed as mainly connoting a body corporate. A body corporate may in law be ordinarily resident in more than one country at the same time: *Swedish Central Railway Co. Ld.* v. *Thompson.*[2] *Egyptian Delta Land and Investment Co. Ld.* v. *Todd*[3] did not overrule that case, a thing which in any event would be a legal impossibility, and, in the absence of any compelling reason to the contrary, the House of Lords should proceed on the basis that under this legislation a company can have two residences, since the legislature, when it passed the Act, must have known that this was the state of the law: *H. Young & Co.* v. *Royal Leamington*

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[1] Finance Act, 1947, s. 39: " (1) " Where the person carrying on a " trade or business is ordinarily resident outside the United Kingdom " throughout a chargeable accounting " period, the profits tax payable by " that person shall be ascertained as " if no net relevant distributions to " proprietors had been made in the " case of that person for that period.

" (2) Where a trade or business is " carried on by a body corporate and, " throughout a chargeable accounting " period, both the following conditions " are fulfilled, that is to say—(*a*) that " that body corporate is ordinarily " resident in the United Kingdom; " and (*b*) that another body corporate " which is not ordinarily resident in the " United Kingdom controls, directly " or indirectly, not less than one half " of the voting power in the first-" mentioned body corporate, distributions to that other body corporate " shall be left out of account in deter-" mining, in relation to the first-" mentioned body corporate, the net " relevant distributions to proprietors " for that period.

" (3) Where the franked investment " income of a person includes income " received from a body corporate " ordinarily resident outside the United " Kingdom to which subsection (1) or " subsection (2) of this section applies, " the preceding provisions of this Part " of this Act relating to the determina-" tion of the net relevant distributions " for any period by reference to the " gross relevant distributions therefor " shall have effect subject to the fol-" lowing modification, that is to say, " that any reference therein to the " profits for the period (not being a " reference to profits computed without " abatement and including franked " investment income) shall be con-" strued as a reference to the first-" mentioned profits increased by the " said income received from the said " body corporate."

[2] [1925] A.C. 495.

[3] [1929] A.C. 1.

Spa Corporation.[4] Therefore it must have known that there would be cases where a company would be resident both in and out of the United Kingdom. Even if Parliament in legislating makes an erroneous assumption as to what the law is, that does not make it the law: see *Inland Revenue Commissioners* v. *Ayrshire Employers' Mutual Insurance Association.*[5] That is the only case in the field of taxation where Parliament has completely forgotten to provide for a set of circumstances. As to the principles of construction to be applied to statutes the terms of which give rise to doubts, see *Inland Revenue Commissioners* v. *Dalgetty & Co. Ld.*[6] and *Howard de Walden* v. *Inland Revenue Commissioners.*[7]

One may have three sorts of companies: (1) companies exclusively resident in the United Kingdom; (2) companies resident within the United Kingdom and abroad, and (3) companies not resident in the United Kingdom. As to the meaning of the expression "ordinarily resident," see *Inland Revenue Commissioners* v. *Lysaght.*[8] In the case of the second category the expression "ordinarily resident outside the United Kingdom" in section 39 (1) does not exclude the possibility of the same body corporate also residing in the United Kingdom. It cannot be confined to bodies exclusively resident outside the United Kingdom. The ordinary meaning of the words is satisfied by the fact that the company is so resident, even if it is resident inside as well. This is in accordance with the primary rule of construction that words must be given their natural meaning, in the absence of some compelling reason obliging the court to give them some other meaning.

The submission that the expression is not intended to denote exclusive foreign residence finds support in section 39 (2) (*a*) and (*b*). In the former the expression "a body corporate . . . "ordinarily resident in the United Kingdom" would admittedly cover one which was also resident outside the United Kingdom. In the latter the expression "body corporate which is not "ordinarily resident in the United Kingdom" was clearly meant to indicate a body corporate with an exclusively foreign residence and a different expression was used from that employed in section 39 (1). "Ordinarily resident outside the United Kingdom" there

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[4] (1883) 8 App.Cas. 517, 521, 526.

[5] 1946 S.C.(H.L.) 1; 175 L.T. 22; 27 Tax Cas. 331.

[6] [1930] 1 K.B. 1, 29; [1930] A.C. 527, 531.

[7] [1948] 2 All E.R. 825, 830; 30 Tax Cas. 345, 369.

[8] [1928] A.C. 234, 243–4.

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is not synonymous with "not ordinarily resident in the United "Kingdom."

The basic features of profits tax under this Act are as follows: Where profits of a body corporate liable to the tax are "distri-"buted" (e.g., in dividend), these are charged at 25 per cent. Those not distributed are given "relief for non-distribution" and charged at 10 per cent. The portion distributed is called the "net relevant distribution." If the distributed profits have borne the full rate, then, when they go in the form of dividend into the hands of a shareholder which is itself a company liable to profits tax, they are not taxed again at all in its hands; this exempted income is called "franked investment income." Profits are only to be charged to the extra 15 per cent. if they are distributed and no profits are to be taxed twice in the hands of different companies. Section 34 gives a special formula for ascertaining the amount of any "net relevant distribution." Section 39 (1) provides, in effect, that where a company liable to the tax is "resident outside the United Kingdom" it is only to be charged at the lower rate of 10 per cent., whether it actually distributes its profits or not. The true construction of this subsection is the subject of this appeal. Such a company is treated as if it had made no net relevant distribution. But if in fact such a company paid a dividend there might be among the recipients a second company which was liable to the tax and which was not itself resident outside the United Kingdom. If that second company paid a dividend out of its income, the income drawn on would include the dividend which it had received from the first company. To ensure that the 15 per cent. distribution charge on the original profits, hitherto forgone, is collected when they emerge in the form of a dividend paid by the second company section 39 (3) alters the normal formula laid down in section 34 for calculating its "net relevant distribution." This subsection is not dealing with or in any way affecting the tax liability of any of the companies mentioned in either subsection (1) or (2), but is concerned solely with that of a company which receives dividends from companies to which subsection (1) or (2) applies. It is intended solely to benefit the Crown. It must be taken to refer to the body corporate mentioned in subsection (2) (*b*) and not to that mentioned in subsection (2) (*a*). A company "not ordinarily "resident in the United Kingdom" (section 39 (2) (*b*)) must of necessity be a company "resident outside the United Kingdom" (section 39 (3)), but the converse is not true.

In the courts below the appellants were not involved in any dilemma by relying on section 39 (3), for they did not rely on it as support for their own contentions in relation to section 39 (1), in construing which its effect is neutral.

The profits tax was intended not merely as a means of raising revenue but also as a way of encouraging the limitation of dividends by United Kingdom companies. This was a purely domestic policy and it may have been thought impolitic to impose it on companies largely foreign, either in character or ownership.

The expression "ordinarily resident outside the United Kingdom" in section 39 (1) does not, on its normal and ordinary meaning, which, in the absence of some context compelling another construction, must be given to the words, mean exclusively so resident but includes a person answering the description but also ordinarily resident in the United Kingdom. Nothing in section 39 (3) compels a contrary conclusion. Therefore these companies are entitled to relief under subsection (1).

Mustoe Q.C. following. The weight of the case against the appellants rests on the words "resident outside the United Kingdom" in section 39 (3), because they are said to point to the conclusion that the phrases used in subsections (1) and (2) are synonymous. But a company is within subsection (1) if it satisfies the wording of that subsection, i.e., it must be carrying on a trade or business; it must be ordinarily resident outside the United Kingdom and it must have been so resident throughout the chargeable accounting period. The two first appellant companies satisfy all these requirements. The fact that they have the other characteristic that they are also resident in the United Kingdom is beside the point: see *Swedish Central Railway Co. Ld.* v. *Thompson.*[9] The expression "outside" includes a case of dual residence.

The double taxation agreements made with other countries illustrate the conception of dual residence: see Double Taxation Relief (Taxes on Income) (South Africa) Order, 1947 (S.R. & O. 1947, No. 315), art. II (1) (*f*) of the agreement set out in the Schedule; Finance Act, 1926, Sch. II, para. 1; Finance (No. 2) Act, 1945, s. 51.

Grant Q.C., *Frederick Bucher* and *Shelbourne* for the third appellant company. A company can be resident in more than one place and so can have two ordinary residences. This company, while ordinarily resident in the United Kingdom, is also resident

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[9] [1925] A.C. 495, 519.

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in Trinidad, where it carries on the largest part of its business activities and a considerable part of its administration and management.

Section 39 (1), in the use of the words "ordinarily resident " outside the United Kingdom," prima facie means what it says, so that a company can be ordinarily resident outside the United Kingdom even if it is ordinarily resident inside also. There is a contrast between those words and the words "not ordinarily " resident in the United Kingdom" in section 39 (2) (*a*). The two expressions must mean something different, and so a company which is ordinarily resident outside the United Kingdom can also, within the meaning of the Act, be ordinarily resident in the United Kingdom. The possibility is not excluded. The proper construction to be put on the words in section 39 (1) is that submitted by counsel for the first two appellant companies.

There is no real analogy between the Income Tax Acts and the present section and no conclusions can be drawn from expressions in those Acts dealing with different matters. The Act of 1947 introduced a new conception of taxation on distributions of profits and there is no ground for a presumption that the tax on such distributions follows the same pattern as previous taxes on the earning of profits. The dichotomy between persons ordinarily resident in the United Kingdom and those not ordinarily resident in the United Kingdom does not apply to this new form of taxation.

The words of section 39 (1) are apt to cover completely a body corporate with dual residence and the appeal should be allowed on three grounds, always bearing in mind that it is settled law that a company can be ordinarily resident in more places than one:

(1) Taking section 39 (1) by itself and giving every word its full value, those words are satisfied by a body corporate which is not only "ordinarily resident outside the United Kingdom" but is also ordinarily resident in the United Kingdom, as fully as they are satisfied by a body corporate which is not also ordinarily resident in the United Kingdom.

(2) In section 39 (2) (*b*) the expression used is "a body corporate which is not ordinarily resident in the United Kingdom," a different expression which does not mean the same thing. *Congreve* v. *Inland Revenue Commissioners*[10] does not bear on this case.

(3) It is common ground that the expression "ordinarily " resident in the United Kingdom" in section 39 (2) (*a*) does

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[10] [1948] W.N. 197; [1948] L.J.R. 1229.

not mean the same thing as "not ordinarily resident outside the "United Kingdom" or "ordinarily resident exclusively in the "United Kingdom," and this is strong ground for holding that "ordinarily resident outside the United Kingdom" does not mean "exclusively resident outside the United Kingdom."

Throughout the Acts imposing the profits tax the expression "not ordinarily resident in the United Kingdom" is employed whenever reference to a company exclusively resident outside the United Kingdom is intended, while the expression "ordinarily "resident outside the United Kingdom," used only in section 39 (1), is clearly intended as a contrast and must be construed in a wider sense to include companies which are also ordinarily resident in the United Kingdom.

Section 39 (3) shows by its references to "a body corporate "ordinarily resident outside the United Kingdom to which sub-"section (1) or subsection (2) of this section applies" (which in the case of subsection (2) means such a body corporate as is described in paragraph (*a*) of subsection (2)) that the section expressly contemplates that a body corporate ordinarily resident in the United Kingdom can also be ordinarily resident outside the United Kingdom, since subsection (2) (*a*) only applies to a "body "corporate . . . ordinarily resident in the United Kingdom," which, in certain events, is relieved from profits tax at the higher rate on its distributions, and it has no application to a body corporate not ordinarily resident in the United Kingdom.

The Crown's argument involves that two different expressions in the same section mean exactly the same thing and that the word "applies" in subsection (3) means exactly what it says in relation to subsection (1) but something quite different in relation to subsection (2), in which it must be construed as "refers." But on this appellant's argument it can be construed in its normal sense. There may be some difficulty in construing the words "or "subsection (2)." At worst they have been inserted ex abundanti cautela and are unnecessary, but that is not a reason for misconstruing the word "applies": see *Inland Revenue Commissioners* v. *Dowdall, O'Mahoney & Co. Ld.*[11] and *Lowry* v. *Consolidated African Selection Trust Ld.*[12]

If the argument relating to the construction of the word "applies" be rejected, this appellant adopts in toto the argument of counsel for the first two appellants. Even if the word means what the Crown contends, subsection (3) is neutral in its effect on the construction of subsections (1) and (2), which must be given their plain meaning.

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[11] [1952] A.C. 401, 413, 426.

[12] [1940] A.C. 648, 653–4.

Sir Lionel Heald A.-G., *Talbot Q.C.* and *Sir Reginald Hills* for the Crown. In section 39 (1) of the Act the words "ordinarily "resident outside the United Kingdom" mean "not ordinarily "resident in the United Kingdom."

As to the construction of an Act of Parliament see Maxwell on Interpretation of Statutes, 9th ed., p. 23. An Act of Parliament must be read as addressed to the public, but the public is supposed to be in possession of the law and the reader is assumed, in the case of a Finance Act, to be a lawyer with sufficient knowledge of tax law. Such a reader, coming to section 39, would know that the profits tax had been preceded by the national defence contribution, a tax of an amount equal to 25 per cent. of the profits of any trade or business to which section 19 (1) of the Finance Act, 1937, imposing the tax, applied. The tax was applicable to companies resident in the United Kingdom and to others not so resident which carried on business there. Further, such a reader would know that by section 30 of the Act of 1947 a new feature was introduced in the distinction between distributed and undistributed profits. No distinction was made between British and foreign companies. It is clear from section 39 that, for some reason of policy not stated in the Act, Parliament was granting relief to foreign companies trading here through branches or through subsidiaries. Moreover, the reader would know that in certain rare conditions a company resident in the United Kingdom may sometimes be described as not exclusively resident there. Previously the existence of dual residence was an immaterial feature in the ascertainment of liability to this tax, the question being: Has the company a residence here? Dual residence was then only a legal curiosity of debatable nature and uncertain extent with no relation to liability.

Since under section 39 of the Act of 1947 relief from the tax is to be given to foreign companies trading here through branches and also through subsidiary companies, one would expect to find that relief was given to foreign companies in the strict sense and that the relevant principles and conditions precedent would be the same in the case of each, under subsections (1) and (2). Previously residence in the United Kingdom was always the criterion of tax liability, and additional foreign residence was immaterial. It would be surprising if tax relief were to be given to a company which was 90 per cent. resident in the United

Kingdom but which had just sufficiently an element of control and abiding abroad to justify attributing to it a dual residence.

In ordinary English the connotation of "outside" is "not "inside." In Murray's English Dictionary "inside" is defined as "the opposite of outside" and "foreign" as "outside the "country." Roget's Thesaurus equates "outside" with "exteriority." An old music-hall song expresses the idea: "If "you're outside you can't be inside." If one says that a person was educated outside Scotland, that is not a normal way of describing a boy who has spent one year at an English school and the rest in Scotland. Examples of the use of the word "outside" in Acts of Parliament are these: Income Tax Act, 1918, r. 5 (1) of the Rules applicable to Cases I and II of Sch. D; Finance Act, 1923, ss. 17 (1) and 19 (2); Finance Act, 1943, s. 18; Finance Act, 1947, s. 20 (4); Finance Act, 1949, s. 23 (1) (*b*).

The appellants' construction of subsections (1) and (2) of section 39 is superficial and legalistic. It is beyond argument that Parliament intended in both subsections to give relief to foreign companies in the broad sense, whether they were operating through branches or subsidiaries. The relief given is the same in both cases. Parliament has equated foreign companies with their subsidiaries. Since the relief given is the same, one would expect the conditions precedent to be the same. Under subsection (2) (*b*) the external residence must be exclusive and accordingly it must also be so under subsection (1). There is no ground for assuming a different criterion as a basis for relief under subsections (1) and (2), when the words used are at least equally capable of establishing equality between them. Whatever subsection (3) may mean, it makes no differentiation in this respect between them. This subsection does not need to be brought into the picture at all but it is perfectly consistent with the Crown's view. It reinforces the Crown's submission that "ordinarily resident "outside the United Kingdom" in subsection (1) is synonymous with "not ordinarily resident in the United Kingdom" in subsection (2) (*b*). The word "applies" in subsection (3) cannot be read in its normal sense and must mean "refers." If it were read in its strict sense it would mean the company mentioned in subsection (2) (*a*) and this would produce a result which cannot have been intended, for it would then be taking away from a company, which had received as franked investment income a dividend from a "body corporate ordinarily resident in the United "Kingdom" mentioned in subsection (2) (*a*), the benefit introduced by section 32 of the Act of 1947. (The company mentioned in subsection (2) (*a*) may be ordinarily resident outside the United Kingdom.)

As to variation of language, see Maxwell on Interpretation of Statutes, 9th ed., pp. 326–7; *Littman* v. *Barron* [13] and *Barron* v. *Littman.*[14]

The key to this matter is the simple approach, particularly having regard to the legal and historical background. The appellants do not approach it in this way.

Talbot Q.C. following. It is true that the Income Tax Acts are not by express enactment made one with the profits tax legislation, but the whole of that legislation has been framed with reference to income tax legislation and both have much in common. The profits tax is one of the increasing progeny of the income tax, framed in recognition of it. The outstanding characteristic of all is the fundamental dichotomy of the charging sections, two main heads of charge, on (1) persons residing in this country in respect of all their profits wherever made, and (2) on profits arising in this country irrespective of residence. There is a double ground of charge resting on the division of conception between persons residing and persons not residing in the United Kingdom. For no purpose relevant to liability to income tax is it ever necessary to inquire whether a person is resident in some particular place outside the United Kingdom in the positive sense. What one needs to know is whether a person does or does not reside in the United Kingdom. This has been so since the beginning of income tax. It is clear that the meaning of "resident "outside" in section 39 (1) is "not resident in," or "resident "elsewhere than in." This construction is not an abuse of language. There was a compelling necessity for an enactment on the lines of section 39 but no necessity that it should go as far as the appellants contend.

Tucker Q.C. in reply. It is not accurate to say that never for income tax purposes is it necessary to prove a particular residence out of the United Kingdom: see Income Tax Act, 1918, Sch. D, para. 1 (a) (*i*), rule 2 of the Miscellaneous Rules applicable to Sch. D, rule 2 of the Rules applicable to Case IV, rule 3 of the Rules applicable to Case V; Finance Act, 1936, s. 18.

One must bear in mind that liability to this new tax was influenced by the question whether or not the profits were distributed. The aim of dividend limitation explains both subsections (1) and (2) of section 39. There is no reason why Parliament

[13] [1951] Ch. 993, 1003.

[14] [1953] A.C. 96, 112–3.

should not deal equally tenderly with a foreign company and one which had a dual residence, e.g., one which was a foreign company for all purposes save for the accident that its board met in the United Kingdom. Section 39 (1) has a deliberate alteration of language from that of some other taxing Acts, using "resident "outside" instead of "not resident in." One should not approach the words with any preconceived notion and then construe the Act in the light of it; one should look at the words first and gather the intention from them. Here no implication is necessary and there is no compelling reason to read "outside" as "not inside." It is begging the question to say that "out-"side" here means "exclusively outside." One should take the natural meaning of the words without restricting them in any way. Subsection (3) is not a reliable guide to the construction of subsection (1). Anomalies are to be found on both sides. Logically, if the Crown's contention as to double residence be accepted, a "body corporate ordinarily resident in the United "Kingdom" referred to in subsection (2) (*a*) should not include a body corporate ordinarily resident outside the United Kingdom, whereas it is accepted that it does include such a body.

In case of doubt a statute should be strictly construed against the Crown: *Stockton and Darlington Railway Proprietors* v. *Barrett* [15]; *Warrington* v. *Furbor* [16]; *Armytage* v. *Wilkinson*.[17]

Grant Q.C. in reply. The word "applies" in section 39 (3) means the same thing in relation to subsection (2) as to subsection (1). In reading subsection (3) the first thing to find is what is meant by "franked investment income." This throws one back to section 32. From that section it appears that "franked "investment income . . . received" includes income received both directly and indirectly. Section 39 (3) is dealing with franked investment income and nothing else. The Crown's contention as to the meaning of "applies" in relation to subsection (2) is wholly unnatural and gives subsection (3) too wide an effect. In subsection (3) the words "body corporate ordinarily "resident in the United Kingdom to which . . . subsection (2) of "this section applies" refers to the opening words of subsection (2) (*a*). Alternatively, in the construction of subsection (1), subsection (3) is neutral and the argument of counsel for the first two appellants is correct.

Their Lordships took time for consideration.

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[15] (1844) 11 Cl. & F. 590, 599–600, 601, 605–6, 607.

[16] (1807) 8 East 242, 245.

[17] (1878) 3 App.Cas. 355, 370.

March 9. LORD NORMAND. My Lords, I fully agree with the opinion which my noble and learned friend, Lord Cohen, is about to deliver and have nothing to add.

LORD OAKSEY. My Lords, I too agree with the opinion which my noble and learned friend, Lord Cohen, is about to deliver.

LORD MORTON OF HENRYTON. My Lords, I also agree with the opinion which my noble and learned friend, Lord Cohen, is about to deliver.

LORD REID. My Lords, I also agree with the opinion.

LORD COHEN. My Lords, these are three appeals brought respectively by Union Corporation Ld., Johannesburg Consolidated Investment Co. Ld., and Trinidad Leaseholds Ld., from three orders of the Court of Appeal made on February 22, 1952, affirming three orders of Harman J. made on July 20, 1951, whereby he dismissed the respective appeals of the three appellant companies from decisions of the Special Commissioners concerning the computation of their respective liabilities to profits tax.

Each of the three appeals raises the same two questions: (i) whether, on the assumption that a company is shown to have been ordinarily resident in a place outside the United Kingdom throughout a given chargeable accounting period, it is, upon the true construction of section 39 (1) of the Finance Act, 1947, entitled to the benefit of that provision in the computation of its liability to profits tax, as having been "ordinarily resident "outside the United Kingdom throughout" the relevant chargeable accounting period within the meaning of section 39 (1), notwithstanding that it was admittedly also ordinarily resident in the United Kingdom throughout the same period; and (ii) if the answer to the first question is in the affirmative whether, having regard to the circumstances in which, according to the authorities, dual residence can, as a matter of law, properly be inferred, the company is on the facts of the case shown to have been throughout the relevant period ordinarily resident in the place outside the United Kingdom claimed as its second or concurrent place of residence.

The effect of the Special Commissioners' decision in each of the three cases was: (i) as regards the first question, that residence in a place outside the United Kingdom throughout a given chargeable accounting period would if established, entitle the company to the benefit of section 39 (1) notwithstanding the admitted fact of concurrent residence in the United Kingdom throughout the same period; but (ii) as regards the second question, that the test of dual residence in their view deducible from the authorities precluded them as a matter of law from holding that the company was on the facts of the case shown to have been ordinarily resident outside the United Kingdom as claimed, concurrently with its admitted residence in the United Kingdom. The claims of the three appellant companies to the benefit of section 39 (1) of the Finance Act, 1947, accordingly failed before the Special Commissioners.

The judge (who took the convenient course also adopted in the Court of Appeal of hearing the three cases together and combining them in a single judgment) differed from the Special Commissioners on both questions, but nevertheless arrived at the same result; for he held (in effect): (i) as regards the first question, that upon its true construction section 39 (1) did not apply to a company ordinarily resident in a place outside the United Kingdom throughout a given chargeable accounting period if it was also ordinarily resident in the United Kingdom during the same period; and (ii) as regards the second question that the Special Commissioners had misapprehended the effect of the authorities as regards the circumstances in which dual residence can as a matter of law properly be inferred; and that, judged by the true test deducible from the authorities when properly understood, the facts as found by the Special Commissioners in the cases of Union Corporation Ld., and Johannesburg Consolidated Investment Co. Ld., sufficed to establish the dual residence in South Africa as well as in the United Kingdom claimed by them respectively, but that as regards Trinidad Leaseholds Ld., the facts so far found were not sufficient to warrant the same course and, had he reached a different conclusion on the first question, he would have thought it necessary to remit the case to the Special Commissioners for further consideration.

The Court of Appeal agreed with the conclusion of Harman J. on the first point though not with all his reasoning; on the second point also they agreed with his view of the law but saw no reason on the facts to distinguish the case of Trinidad Leaseholds Ld. from that of the other two companies.

Before I consider the ratio decidendi in the courts below it will be convenient to refer briefly to so much of the legislation

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dealing with profits tax as is relevant to the questions your Lordships have to decide.

Profits tax was first introduced under the style "national defence contribution" by section 19 of the Finance Act, 1937, and was charged on all the profits of each chargeable accounting period arising from any trade or business irrespective of whether the profits were distributed or were retained in the business. It was levied on individuals and partnerships as well as on bodies corporate. Section 19 (2) provided as follows: "Subject as "hereafter provided, the trades and businesses to which this "section applies are all trades or businesses of any description "carried on in the United Kingdom, or carried on, whether "personally or through an agent, by persons ordinarily resident "in the United Kingdom." By section 20 (1) it was provided that the profits arising from a trade or business were to be computed on income tax principles as adapted in accordance with the provisions of Sch. IV to the Act.

The tax, originally introduced for a period of five years, was continued indefinitely by section 36 of the Finance Act, 1942. Its name was changed to profits tax by section 44 of the Finance Act, 1946. A radical alteration in the character of the tax was made by the Finance Act, 1947, which introduced an entirely new feature in the shape of discrimination between distributed and undistributed profits. By section 30 (1), as amended by the Finance (No. 2) Act, 1947, s. 7, the rate of profits tax was increased to 25 per cent. By section 30 (2), as similarly amended, relief was granted at the rate of 15 per cent. on the amount of any excess of profits chargeable to tax for any chargeable accounting period over the amount of profits distributed for that period (in the section called "net relevant distribution"). Conversely, by section 30 (3), as similarly amended, an additional charge at the rate of 15 per cent. was made on the amount of any excess of profits distributed for any chargeable accounting period over the profits chargeable to tax for that period.

The broad effect of the provisions thus briefly summarized was therefore to charge profits tax at the rate of 25 per cent. on distributed and 10 per cent. on undistributed profits; and these were the rates in force during the periods relevant to the present appeals. By section 31 of the Finance Act, 1947, trades or businesses carried on by individuals, partnerships of individuals and persons acting as personal representatives were exempted from the tax, and its scope (save in certain special cases probably rare in practice) was thus in effect limited to trades or businesses carried on by corporate bodies. The Act also contains elaborate provisions, which need not for the present purpose be considered in detail but to which some further reference is made hereafter, for exempting from further liability to tax profits received by way of distribution by one profits tax paying concern from another (termed in the Act " franked investment income "), and for excluding the appropriate proportion of any franked investment income in computing the amount of any taxable distribution made out of profits which include franked investment income.

I turn now to section 39 of the Finance Act, 1947, upon the true construction of subsection (1) of which the first question before your Lordships' House turns. Subsections (1) and (2) are in the following terms: " (1) Where the person carrying on a " trade or business is ordinarily resident outside the United King" dom throughout a chargeable accounting period, the profits tax " payable by that person shall be ascertained as if no net relevant " distributions to proprietors had been made in the case of that " person for that period. (2) Where a trade or business is carried " on by a body corporate and, throughout a chargeable accounting " period, both the following conditions are fulfilled, that is to say " —(*a*) that that body corporate is ordinarily resident in the United " Kingdom; and (*b*) that another body corporate which is not " ordinarily resident in the United Kingdom controls, directly or " indirectly, not less than one half of the voting power in the " first-mentioned body corporate, distributions to that other body " corporate shall be left out of account in determining, in relation " to the first-mentioned body corporate, the net relevant distribu" tions to proprietors for that period." It will be observed that subsection (1) granted relief to a foreign body corporate carrying on a trade or business in the United Kingdom in its own name, while subsection (2) in effect granted relief to a foreign company carrying on business in the United Kingdom through a subsidiary company. It is, however, also to be noticed that if the subsidiary company was not a 100 per cent. subsidiary company the relief granted would enure to the benefit also of the other shareholders in the subsidiary company.

Subsection (3) is a charging and not an exempting provision and its purpose appears to be to levy a distribution charge on profits which have obtained relief under subsection (1) or subsection (2) but ultimately find their way into the coffers of a body corporate resident in the United Kingdom. The subsection provides as follows: " Where the franked investment income of " a person includes income received from a body corporate

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"ordinarily resident outside the United Kingdom to which "subsection (1) or subsection (2) of this section applies, the "preceding provisions of this Part of this Act relating to the "determination of the net relevant distributions for any period "by reference to the gross relevant distributions therefor shall "have effect subject to the following modification, that is to "say, that any reference therein to the profits for the period (not "being a reference to profits computed without abatement and "including franked investment income) shall be construed as a "reference to the first mentioned profits increased by the said "income received from the said body corporate."

With these provisions in mind I return to the judgments of Harman J. and of the Master of the Rolls who delivered the judgment of the Court of Appeal, and I shall confine myself for the time being to the question of the true construction of section 39 (1).

Harman J. based his decision mainly on three points: (1) He considered that to describe a person, whether real or juridical, as resident outside an area implies prima facie non-residence within it. (2) He considered that in subsection (2) the contrast between the expressions "resident in" in (*a*) and "not resident in" in (*b*) necessarily involved that "resident in" in (*a*) meant "resident in and nowhere else," and from this he arrived at the conclusion that "resident outside" in subsection (1) should be opposite to that, namely, resident outside and nowhere else. (3) He considered that the introductory words of subsection (3), "Where the franked investment income of a person includes "income received from a body corporate ordinarily resident "outside the United Kingdom to which subsection (1) or sub-"section (2) of this section applies" gave rise to the obvious inference that the body corporate referred to as resident outside the area was one to which subsections (1) and (2) applied indifferently: in other words, that to the draftsman "resident "outside" and "not resident in" were synonymous.

The Master of the Rolls agreed with Harman J. as to the prima facie meaning of the phrase "resident outside." He rejected, and I think rightly rejected, the second point on which Harman J. relied, since, as the Master of the Rolls pointed out, once it is conceded that a company may be resident in two places the positive finding that a company is resident in the United Kingdom does not necessarily exclude a finding that the same company is also resident outside the United Kingdom. The

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Master of the Rolls agreed, however, with Harman J. in the inference that he drew from subsection (3).

He ended his judgment on this question by saying[1]: "We "think, however, that support for the Crown's contention (apart "from the prima facie meaning of the word 'outside') is also "to be found in the structure of the legislation by which the "profits tax is imposed. The normal dichotomy in the taxing "acts is between persons residing in, and persons residing out "of, the United Kingdom. We use the word 'normal' to show "that we have not overlooked the fact (pointed out by Mr. Grant) "that the 1947 Act introduced a new conception, namely, "differential rates of profits tax according to whether profits "were distributed or not, and that the distinction is not one "wholly between resident and non-resident, since under section "39 (2) relief is given to a person who is resident in this country. "The distinction does, however, appear in section 19 of the "Finance Act of 1937 which first imposed the national defence "contribution. The companies were made subject to the tax by "the Act of 1937, and if it had been intended by section 39 (1) "of the Act of 1947 to give persons resident not only inside but "also at the same time outside the United Kingdom relief "already given by the same section to persons residing exclusively outside the United Kingdom, the legislature would, in "our opinion, have said so in terms. In our judgment, the "words of section 39 (1) construed in their natural meaning in "their context, and against the background of the taxing Acts "generally, can only properly be construed in the sense contended for by the Crown so that the companies, being resident "inside, cannot claim the benefit conferred by the section on "persons resident outside the United Kingdom."

Before your Lordships, Mr. Tucker, for the first two appellant companies, relied on the same arguments which he addressed to the Court of Appeal. They may be summarized as follows: (1) Once it is admitted that for the purposes of the profits tax Acts a company may reside both outside and in the United Kingdom, the expression "ordinarily resident outside the United "Kingdom" does not exclude the possibility of the same body corporate residing in the United Kingdom. This construction is reinforced by the fact that it is common ground that the expression a "body corporate . . . ordinarily resident in the United "Kingdom" in subsection (2) (*a*) would cover a body corporate

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[1] [1952] 1 T.L.R. 651, 658.

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which was also resident outside the United Kingdom. (2) The change of language from "ordinarily resident outside" in subsection (1) to "not ordinarily resident in" in subsection (2) (*b*) connotes a change of meaning. (3) He agreed with the Attorney-General that the expression in subsection (3) "a body corporate "ordinarily resident outside the United Kingdom to which . . . "subsection (2) . . . applies" refers to the "body corporate which "is not ordinarily resident in the United Kingdom" mentioned in subsection (2) (*b*) and not to the "body corporate . . . "ordinarily resident in the United Kingdom" referred to in subsection (2) (*a*). He differed, however, from the Attorney-General by insisting that subsection (3) was neutral in its effect when construing subsection (1). He concluded by submitting that (1) the primary rule of construction is that words must be given their natural meaning in the absence of some context forcing your Lordships to place some other meaning upon them; (2) the possibility of dual residence being admitted, the natural meaning of the words "a person . . . ordinarily resident outside "the United Kingdom" is inclusive of a person answering the description but also ordinarily resident in the United Kingdom; (3) as his clients were companies within that category they were entitled to the relief given by subsection (1).

I am unable to accept this argument. It seems to me that the expression your Lordships have to construe is capable of bearing either the inclusive or the exclusive meaning. I agree with the Master of the Rolls that the section must be construed in the light of the provisions of Part III of the Finance Act, 1937, with which it has, under section 74 of the Finance Act, 1947, to be read, and also against the background of the taxing Acts generally. That background is, I think, correctly stated in the passage from the judgment of the Master of the Rolls which I have already read. I appreciate that the change in language to which Mr. Tucker referred is prima facie against the construction to which reference to the background of the Acts would lead me, but I agree with the explanation of that change of language offered by the Master of the Rolls when he says [2]: "We admit that if the Crown are right, the change in "terminology is open to criticism as a matter of drafting, but "we think it is easy to see (upon the Crown's view) how it may "have come about. The Act reads in section 39 (2) (*a*) 'that "'that body corporate is ordinarily resident in the United "'Kingdom,' and then continues in section 39 (2) (*b*) 'that

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[2] [1952] 1 T.L.R. 651, 657.

" 'another body corporate which is not ordinarily resident in " 'the United Kingdom' etc. In drafting (*a*) and (*b*) together it " seems natural enough to add the word 'not' before the words " 'ordinarily resident' rather than to look back to see what form " of words was used in section 39 (1) to describe the same thing."

Looking at the matter as a whole I should be inclined, quite apart from subsection (3), to the opinion expressed by the Court of Appeal that the words of section 39 (1) construed in their natural meaning in their context, and against the background of the taxing Acts generally, should be construed in the sense contended for by the respondents. I would add that any doubt I might otherwise have felt is removed by subsection (3) if that subsection is to be construed in the sense for which the Attorney-General and Mr. Talbot contend and which Mr. Tucker accepts. Once it is admitted that the expression in subsection (3) "body " corporate ordinarily resident outside the United Kingdom to " which . . . subsection (2) . . . applies" refers to the body corporate mentioned in subsection (2) (*b*), it seems to me a necessary inference that the expression "body corporate ordinarily resident " outside the United Kingdom" and "body corporate . . . not " ordinarily resident in the United Kingdom" are being used by the draftsman as interchangeable terms. The latter phrase is plainly exclusive of a body corporate also resident in the United Kingdom, and it follows that the exclusive meaning must be attributed to the former.

Mr. Grant, however, for Trinidad Leaseholds Ld., while adopting the rest of Mr. Tucker's argument, differs from him as to subsection (3) and contends that the expression "body corporate " ordinarily resident outside the United Kingdom to which . . . " subsection (2) . . . applies" is a reference to the "body corporate " . . . ordinarily resident in the United Kingdom" mentioned in subsection (2) (*a*). He founds his argument on the contention, which I think is not disputed, that if the Attorney-General is right, the word "applies" cannot be read in its normal sense and must be construed as "refers." He points out that if his construction be accepted, the word "applies" can be given its natural meaning, and he says that as the possibility of dual residence is admitted, the company ordinarily resident in the United Kingdom referred to in subsection (2) (*a*) may often be also a company ordinarily resident outside the United Kingdom. This is no doubt true, but the wording of subsection (3) is extremely inept if the intention was to refer to the body corporate mentioned in paragraph (*a*) of subsection (2), and the contention of the

Attorney-General that in relation to subsection (2) the word "applies" in subsection (3) means "refers" seems to me to involve far less a distortion of the language of the section.

It must also be observed that if Mr. Grant and Mr. Tucker are right, a company might answer the description of a body corporate ordinarily resident outside the United Kingdom in subsection (1) and also be a company ordinarily resident in the United Kingdom not less than half of the voting power in which was held by a company not ordinarily resident in the United Kingdom within subsection (2). There could, therefore, plainly be an overlap between subsections (1) and (2). The existence of such an overlap is not an inevitable bar to the acceptance of their argument since, as Mr. Tucker points out, there are instances under the Income Tax Acts where a taxpayer can be taxed under one or other of the taxing provisions at the option of the Crown, but none the less, if I were left in doubt as between two constructions and there were no other factors to consider, I should prefer the construction which avoided the overlap.

Bearing all these considerations in mind, I have come to the conclusion that the Court of Appeal were right when they said that the words of section 39 (1), construed in their natural meaning and against the background of the taxing Acts generally, can only be construed in the sense contended for by the respondents, so that the appellants, being resident inside, cannot claim the benefit conferred by the section on persons resident outside the United Kingdom. In arriving at this conclusion I have not overlooked Mr. Tucker's contention that on this basis logically the "body corporate . . . ordinarily resident in the United Kingdom" referred to in subsection (2) (*a*) should not include a body corporate ordinarily resident outside the United Kingdom, whereas the respondents accept that it does include such a body corporate. Since the construction of subsection (2) is not now directly in point and may arise before us in another case, I prefer to say no more than that I do not think this contention can affect your Lordships' decision in view of the other matters to which I have referred.

Mr. Tucker submitted that in case of doubt the statute should be strictly construed against the Crown, and he relied on the following cases: *Stockton and Darlington Railway Proprietors* v. *Barrett*,[3] *Warrington* v. *Furbor*[4] and *Armytage* v. *Wilkinson*.[5] I observe that in the last mentioned case in the Judicial Committee of the Privy Council Sir James Colvile, delivering the judgment of the Board, said[6]: "It is only, however, in the "event of there being a real difficulty in ascertaining the meaning of a particular enactment that the question of strictness or "of liberality of construction need arise." In the case before your Lordships I find it unnecessary to consider whether the principle on which Mr. Tucker relies applies to such a case as the present or whether, where the question is whether a taxpayer brings himself within the category of persons entitled to total or partial exemption from duty, it may not be right to apply the ordinary principle that the onus of proving an allegation rests on the person making it.

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[3] (1844) 11 Cl. & F. 590.

[4] (1807) 8 East 242.

[5] (1878) 3 App.Cas. 355.

Both Harman J. and the Court of Appeal dealt at length with the question whether each of the three appellant companies was in fact resident outside as well as inside the United Kingdom, no doubt in order that your Lordships might have the assistance of their opinion on that question in case your Lordships differed from them on the first question. In view of the fact that your Lordships are affirming the decision of the Court of Appeal on the first question, I do not find it necessary to consider the second question.

For the reasons I have stated I would dismiss the appeals with costs.

Appeals dismissed.

Solicitors: *Herbert Smith & Co.; Holmes, Son & Pott; Solicitor of Inland Revenue.*

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[6] Ibid. 370.

[HOUSE OF LORDS.]

H. L. (E.)†
1953
Feb. 24, 25, 26;
Apr. 20.

BRAY (INSPECTOR OF TAXES) . . . APPELLANT;
AND
COLENBRANDER . . . . RESPONDENT.
HARVEY (INSPECTOR OF TAXES) . . APPELLANT;
AND
BREYFOGLE . . . . RESPONDENT.

Revenue—Income tax—Employment—Agreement made abroad—Employment exercised in United Kingdom—Remuneration payable abroad—Assessment—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Cases II, V; Sch. E.*

The London correspondent of a Dutch newspaper was a Dutch national but for the purpose of his employment resided in London.

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† *Present*: LORD NORMAND, LORD OAKSEY, LORD MORTON OF HENRYTON, LORD REID and LORD COHEN.

His employers resided in Holland and his salary was payable there. Part of his salary was paid directly to his family in Holland and the remainder was remitted to him in London through his employers' bank. The Crown claimed income tax under Sch. E on the whole of his salary for the years during which he had occupied the position of London correspondent:—

Held, that since, under the contract of employment the place of payment of the remuneration was Holland, that remuneration was income arising from a foreign possession within Case V of Sch. D, and the arrangement by which part of the salary became available in London did not affect the position. The taxpayer was therefore assessable to income tax only under Case V, viz., only on the amount of remittances to the United Kingdom.

Bennett v. *Marshall* [1938] 1 K.B. 591, applying *Foulsham* v. *Pickles* [1925] A.C. 458, approved.

Decision of the Court of Appeal [1952] 2 T.L.R. 499; [1952] W.N. 404 affirmed.

APPEALS from the Court of Appeal (Somervell, Denning and Romer L.JJ.).

These were two appeals by the Crown from orders of the Court of Appeal dated July 24, 1952. These orders dismissed appeals by the Crown from orders of the Chancery Division (Danckwerts J.) dated respectively May 2, 1952 (*Bray* (*Inspector of Taxes*) v. *Colenbrander*) and May 1, 1952 (*Harvey* (*Inspector of Taxes*) v. *Breyfogle*). These orders were made on appeals by the Crown on cases stated by the Commissioners for the Special Purposes of the Income Tax Act, 1918, under section 149 of the Income Tax Act, 1918, the Special Commissioners having allowed appeals by the respective respondents against assessments made on them under Sch. E of the Act.

The respondent Colenbrander was a Dutch national. Since June 1, 1945, he had been employed by *Het Parool*, a Dutch newspaper, as a journalist. As from December 1, 1945, he was appointed under a contract made in Holland to be the London correspondent of the newspaper and, except for holidays and occasional visits to Amsterdam for the purpose of conferring with the editor of the paper, he had from December 23, 1945, lived and worked in London. It was not disputed that at all material times he had been a person residing in the United Kingdom within the meaning of the Income Tax Acts. His remuneration was payable in Holland and a portion of it had been paid month by month to his wife there. At his request his employers remitted the balance to a bank in London at which they had an account. He was entitled to draw on it to the extent of the balance of his salary and for certain expenses. He admitted liability to United Kingdom income tax on the amounts so remitted. The question in dispute was whether he was liable also on the unremitted portion of his remuneration. He had been assessed to income tax under Sch. E to the Act of 1918, as amended by section 18 of the Finance Act, 1922, in respect of his total remuneration for the years 1945 to 1950 inclusive.

The respondent Breyfogle was employed by the National City Bank of New York, a banking corporation incorporated in New York and having its head office there. He was manager of its London branch. He was an American citizen domiciled in the United States, but for the year of assessment 1947–48 he was resident in the United Kingdom. By the terms of the oral agreement under which he was posted to London, his remuneration was paid to the credit of his account with the bank in New York. The question was whether he was liable to be taxed under Sch. E in respect of all the income arising from his employment or to be taxed only to the extent that this income might be remitted to the United Kingdom. He had been assessed to income tax under Sch. E for the year 1947–48 on the former basis.

Sir Lionel Heald A.-G. and *Sir Reginald Hills* (*Tucker Q.C.* with them) for the Crown. The points of principle raised by the two cases are identical. To fall within Case V of Sch. D to the Income Tax Act, 1918, " possessions out of the United Kingdom " must be wholly outside the United Kingdom. In *Colquhoun* v. *Brooks* [1] it was decided that the expression " possessions " was comprehensive enough to include within it every source of income, including trade, and that in order to fall within the words the trade must be carried on wholly outside the United Kingdom. But that case should not be given the effect it was given in *Bennett* v. *Marshall*,[2] on which the Special Commissioners were not entitled to rely. It decided that an employment is entirely outside the United Kingdom if the place of payment under the contract of employment is outside and that the place where the duties are performed is not relevant to the question whether or not the " possession " is outside the United Kingdom. That was a wrong decision and in that case the Court of Appeal were wrong in holding that they were bound so to decide by *Foulsham* v. *Pickles*,[3] for the question in that case was totally different from that raised before the Court of Appeal. In *Foulsham* v. *Pickles* [3] the House of Lords did not decide that the place where the work was done was irrelevant and that the relevant consideration was where the remuneration was payable. That was no part of its decision nor was it necessary to say that the sole and decisive test as to the location of the employment is the place of payment. If a London employer and his secretary went to Jersey and agreed that her remuneration should be paid there, and if afterwards they returned to London and carried on work there, it could not be contended that the employment should be treated as being in Jersey. A very important question in deciding where an employment is " carried on " within para. 1 (ii) of Sch. D is not only where the employee gets his money but also where he does the work. This is emphasized by the phrase " carried on." One must look at the substance of what produces the income, and that is the employee's work. The most unnatural thing to judge by is where the employee is paid his money; the most natural thing is where he does the job.

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[1] (1889) 14 App.Cas. 493.

[2] [1938] 1 K.B. 591; 54 T.L.R. 320; [1938] 1 All E.R. 93.

[3] [1925] A.C. 458; 41 T.L.R. 323.

[They referred to *London Bank of Mexico* v. *Apthorpe* [4]; *Davies* v. *Braithwaite* [5]; *Nathan* v. *Federal Commissioner of Taxation* [6]; *Diggines* v. *Forestal Land, Timber and Railways Co. Ld.* [7]; *Pickles* v. *Foulsham* [8]; *Foulsham* v. *Pickles.* [9]]

Sir Reginald Hills following. *San Paulo (Brazilian) Railway Co. Ld.* v. *Carter* [10] is a strong case in favour of the Crown. Here on the ordinary meaning of language there is the clearest case of employment carried on wholly or largely in this country. It is in the teeth of the Act to say that the employments were not carried on partly in London. The right to receive the remuneration must not be substituted for the employment. There is no reason for making any differentiation merely because the employment is under a contract.

Talbot Q.C. and *Desmond Miller* for the first respondent. The starting point is Lord Dunedin's two propositions in *Foulsham* v. *Pickles* [11]: " this income must be income from a possession; " and the possession must be out of the United Kingdom." In *Colquhoun* v. *Brooks* [12] Lord Macnaghten defined " possessions " in Ireland " as " everything, every source of income that the " person chargeable has in Ireland," and this is not disputed.

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[3] [1925] A.C. 458; 41 T.L.R. 323.

[4] [1891] 2 Q.B. 378, 383.

[5] [1931] 2 K.B. 628.

[6] (1918) 25 C.L.R. 183, 189.

[7] [1931] A.C. 380, 384–7.

[8] [1924] 1 K.B. 323, 326.

[9] [1925] A.C. 458, 463, 468.

[10] [1896] A.C. 31.

[11] [1925] A.C. 458, 465.

[12] 14 App.Cas. 493, 516.

The whole ground of debate in the present case is whether the possession in the present case is outside the United Kingdom. Counsel for the Crown have directed themselves not to the location of the possession but to the location of the performance of the employment. But the employment was not a source of income within the scope of the charge to income tax under Sch. E of the Income Tax Act, 1918, for the remuneration arose under a contract made abroad with employers resident abroad and it was payable abroad, so that it was income arising from a possession out of the United Kingdom within Case V of Sch. D and the measure of assessability is the amount of the actual sums received in the United Kingdom (see rule 2 of the Rules applicable to Case V). The present cases do not fall within Case II of Sch. D.

It is only as sources of income, as income producers, that the Income Tax Acts are concerned with trades, professions, vocations and employments, and a possession is important only as a source of income; its location is that of the attribute which is relevant, viz., its attribute as a source of income. For the purposes of the Acts a possession is equivalent to a source of income, and so, when it is sought to fix a possession with a locality, it is the source of income which is looked at and no other attribute. Thus, while, from other points of view, the location of an employment may depend on the terms of the contract or on whether one looks at the activities of the employment or on whether one views the matter as the employer, the income tax approach regards it purely as a source of income. The employment is entirely outside the United Kingdom if the place of payment under the contract is outside it. The place where the duties are performed is irrelevant to the question whether or not the "possession" is outside the United Kingdom.

Profits or gains chargeable with income tax under Case V of Sch. D are expressly exempted from the operation of the provisions of section 18 of the Finance Act, 1922, whereby certain profits or gains arising from (inter alia) employments become chargeable under Sch. E instead of Sch. D. Once one has passed the barrier so as to be within Case V it is no longer relevant to inquire where the employment is carried on.

In *Bennett* v. *Marshall*,[13] as in the present cases, there was only one nexus with the United Kingdom and that was where the work was done. It was rightly decided and properly applied

[13] [1938] 1 K.B. 591.

the principles expressed in *Foulsham* v. *Pickles.*[14] Whatever doubts there may be about the effect of the opinion of Viscount Cave L.C.[15] in that case, three of the Lords delivered opinions favourable to the present respondents, Lord Dunedin, Lord Atkinson and Lord Buckmaster.

Borneman Q.C. and *S. M. Young* for the second respondent. In substance this is one case only, and so far as the second appeal is concerned the arguments of counsel for the first respondent are adopted.

The Crown's emphasis on the words "carried on" is not justified. They only slipped into the Act by a side wind. In the Income Tax Act, 1803 (43 Geo. 3, c. 122), the words are used for the first time in Sch. D (section 84) in the phrase "profession, "trade or vocation . . . carried on in Great Britain or elsewhere." In the Income Tax Act, 1842 (5 & 6 Vict. c. 35) the word "em-"ployment" appears for the first time in Sch. D (section 100). Thus the phrase "carried on" comes into relation with it without any specific intention being displayed by the legislature to give it the force for which the Crown contends. The Income Tax Acts from 1803 onwards had no interest to define where a source of income is situated. "Source" is not to be regarded as being a legal concept. It is what the practical man means by a source —the fountain-head. The source of the Thames is in Gloucestershire; it is not the rain without which it would dry up. In the case of an employment the source of the income is the contract with the employer. In the case of a trade or profession the source of the income is the work done. Case V draws a clear distinction between what is expected of a trade or profession and what is expected of an employment. In *Foulsham* v. *Pickles*[16] the opinion of Lord Dunedin, concurred in by Lord Atkinson, and that of Lord Buckmaster are clear and unequivocal and what they said need be given no meaning other than its ordinary meaning. Nothing that Viscount Cave said is inconsistent with it.

Sir Reginald Hills in reply. It has hitherto been accepted in the authorities that in the logical application of the principles based on *Colquhoun* v. *Brooks*[17] in order to take a source of income out of Case II and put it into Case V it must be wholly out of the United Kingdom: see *Bennett* v. *Marshall.*[18] The incursions into history by counsel for the second respondent do not assist the construction of the Income Tax Act, 1918. One

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[14] [1925] A.C. 458, 465, 468.
[15] Ibid. 462–3.
[16] [1925] A.C. 458, 466, 468.
[17] 14 App.Cas. 493.
[18] [1938] 1 K.B. 591, 600.

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knows nothing about slipping in words; one only knows that they are there. The phrase "carried on" cannot be ignored in the case of a person with a contract. The argument against the Crown in effect substitutes for the words "employment . . . carried on "in the United Kingdom" some such words as "salaries derived "from a contract of employment in the United Kingdom." If one keeps to the language of the Act there is no real difficulty in this case. One asks where the work is done. The Act is concerned with "profits or gains," not salary: see the phraseology of section 18 of the Finance Act, 1922. The origin of that section was in the decision of *Great Western Railway Co.* v. *Bater.*[19]

Their Lordships took time for consideration.

April 20. LORD NORMAND. My Lords, in each of these appeals the respondent entered into a contract of employment with an employer resident abroad. The contract was in each case entered into in the country of the employer's residence and it provided for payment of the employee's remuneration in that country. Parenthetically it should be said that there is no suggestion that the place of payment was nominal or pretended, or that the real or genuine place of payment was not the place specified in the contract. Nothing, therefore, of what follows in this opinion in any way touches a case where the designated place of payment is challenged as nominal or pretended and unreal. Substantially the whole duties of the employee under the contract in each case were performed in the United Kingdom and any duties performed elsewhere were, for the purposes of these appeals, negligible. The respondents were resident in the United Kingdom at all material times.

By the assessments under review the Crown assessed each of the respondents under Sch. E in respect of all sums paid to them as the remuneration of their employment and the Crown has consistently maintained that the respondents were assessable as persons residing in the United Kingdom in respect of the whole annual profits and gains accruing from an employment carried on in the United Kingdom under Case II of Sch. D which, by the provisions of section 18 of the Finance Act, 1922, became chargeable under Sch. E. The respondents have with equal consistency maintained that they are assessable under Case V of Sch. D and that the measure of assessability is the amount of the actual sums annually received by them in the United Kingdom: rule 2 of the Rules applicable to Case V. They claim the benefit of the express exception in section 18 (1) of the Finance Act, 1922, whereby profits and gains chargeable under Case V of Sch. D remain chargeable under that schedule.

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[19] [1922] 2 A.C. 1.

It is now quite settled that the word "possession" in Case V covers employment: *Colquhoun* v. *Brooks*[1]; *Foulsham* v. *Pickles*[2]; *Bennett* v. *Marshall*,[3] *per* Greene M.R. But to fall within Case V the "possession," the employment, must be outside the United Kingdom, which means entirely outside the United Kingdom. The respondents' case is that an employment is entirely outside the United Kingdom if the place of payment under the contract of employment is outside the United Kingdom, and that the place or places at which the duties of the employment are performed by the employee are irrelevant to the question whether the "possession" is outside the United Kingdom. They further say, and it is admitted, that *Bennett* v. *Marshall*[4] so decided. *Bennett* v. *Marshall*[4] was decided by the Court of Appeal, and the Special Commissioners, Danckwerts J. and the Court of Appeal have all followed it as an authority binding on them in the present cases.

The present appeals are therefore brought for the purpose of bringing under review the ruling of the Court of Appeal (Greene M.R., Romer and MacKinnon L.JJ.) in *Bennett* v. *Marshall*[4] that the employee was assessable only under Case V because the place of payment of his remuneration was outside the United Kingdom, and that the fact that some of his duties were performed in the United Kingdom was irrelevant to the question whether the "possession" was wholly outside the United Kingdom. The Court of Appeal's decision was unanimous and it affirmed the judgment of Lawrence J., as he then was, in the court below. In both courts it was held that the case was concluded by the decision and reasoning of this House in *Foulsham* v. *Pickles*.[5] That was disputed by the Crown, and it is the real point of controversy in this case. The facts in *Foulsham* v. *Pickles*[5] were the converse of those in the present cases and in *Bennett* v. *Marshall*,[6] for in it the taxpayer was employed abroad by an English company under a contract of employment, which provided for payment of his remuneration in England. This House held that his employment was not wholly out of the United Kingdom. The question debated in *Bennett* v. *Marshall*[6] was whether the ratio decidendi of this House in *Foulsham* v. *Pickles*[7] was (a) that the place or places where the employee performed his duties were irrelevant to the question whether his employment was wholly outside the United Kingdom, and that the only relevant matter was the place of payment of his remuneration, or (b) that the place of payment was *a* relevant consideration, without excluding as irrelevant the place or places at which the duties were performed.

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[1] 14 App.Cas. 493; 5 T.L.R. 728.

[2] [1925] A.C. 458; 41 T.L.R. 323.

[3] [1938] 1 K.B. 591, 600–1; 54 T.L.R. 320, 322; [1938] 1 All E.R. 93, 95–6.

[4] [1938] 1 K.B. 591.

[5] [1925] A.C. 458.

[6] [1938] 1 K.B. 591.

That question was carefully considered by Lawrence J. and by the members of the Court of Appeal in *Bennett* v. *Marshall*.[8] The Master of the Rolls devoted a large part of his judgment to a close examination of the speeches of each of the noble Lords who took part in *Foulsham* v. *Pickles*.[9] All these learned judges came to the conclusion which I take from the words of Romer L.J. His words are all the more worthy of attention since he confessed that, apart from authority, he would have come to a different view. After stating[10] that *Colquhoun* v. *Brooks*[11] had decided that "every source of income of which it can be legitimately said that it is situated wholly abroad is taxable under "Case V of Sch. D," he concluded thus[12]: "The House of "Lords . . . in *Foulsham* v. *Pickles*[13] have definitely decided "that in the case of an employment the locality of the source "of income is not the place where the activities of the employee "are exercised but the place either where the contract for payment is deemed to have a locality or where the payments for "the employment are made, which may mean the same thing."

I have studied the judgments of Lawrence J. and of the Court of Appeal in *Bennett* v. *Marshall*[14] so far as they bear on the question of the ratio decidendi of *Foulsham* v. *Pickles*,[15] and I am unable to find any ground for rejecting them or indeed any ground for criticism. It is my humble opinion that the Master of the Rolls, who dealt most fully with the point, expounded the House of Lords judgments with extraordinary precision and insight. It would be a mere waste of time to go over again the ground that he has so completely and satisfactorily covered in that part of his judgment. There is no doubt left in my mind that this case is governed by the ratio of *Foulsham* v. *Pickles*.[15]

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[6] [1938] 1 K.B. 591.

[7] [1925] A.C. 458.

[8] [1938] 1 K.B. 591.

[9] [1925] A.C. 458.

[10] [1938] 1 K.B. 591, 612.

[11] 14 App.Cas. 493.

[12] [1938] 1 K.B. 591, 613–4.

[13] [1925] A.C. 458.

[14] [1938] 1 K.B. 591.

The appeals must therefore, I think, be dismissed with costs. But before leaving the cases I wish to refer to a matter which at one time caused me some uneasiness, and which I mentioned at an early stage of the hearing as a matter which might require consideration.

If, instead of being fully satisfied that *Bennett* v. *Marshall*[16] had correctly interpreted the reasoning in *Foulsham* v. *Pickles*,[17] we had come to think, on a nice balance of considerations on one side and the other, that the Crown's argument in the appeals should on the whole be preferred, what would our duty have been? Ought we to have given judgment in favour of the Crown? Or ought we to have had regard to the hardships and injustices which might result? The point is this. In 1938 *Bennett* v. *Marshall*[18] was decided; leave was obtained to appeal to this House but nothing followed on that. In the successive Finance Acts between 1938 and 1950 when the assessments in the present cases were, I think, made, the Inland Revenue could have laid before Parliament a clause to make it clear for the future that the place where the employee performed his duties was a relevant circumstance in considering the locality of the employment. Nothing was done. But now this appeal is taken and if it had succeeded it would have rendered a number of taxpayers liable to additional assessments going back six years. In the interval between 1938 and 1950 many people must, I should think, have entered into contracts of employment with a tract of future time in the faith that the place of payment of their salary was conclusive in settling whether they would have to pay British income tax on the actual amount of their remuneration remitted to the United Kingdom, or upon the whole amount of their remuneration. That would have been for them of great importance when they were negotiating the contract.

This matter was mentioned at the hearing but it was not debated. I would have asked that it should be debated if the conditions in which it might have been important had not evaporated by the conclusion of the argument. I am still in doubt about what our duty would have been if these conditions had still been present. I have formed no opinion about it, save on this one point, that in modern times it would be unrealistic to attach more importance to a disposition of property made on the faith of a judicial decision than to a contract with a tract of future time entered into on the faith of a judicial decision. I wish it to be clearly understood that in raising this question as I did, I had no thought of blaming or casting any reflection on anyone.

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[15] [1925] A.C. 458.

[16] [1938] 1 K.B. 591.

[17] [1925] A.C. 458.

[18] [1938] 1 K.B. 591.

LORD MORTON OF HENRYTON. My Lords, my noble and learned friend, Lord Oaksey, has asked me to say that he agrees with the opinion which has just been delivered.

My Lords, I agree that this appeal must be dismissed, for the reasons given by my noble and learned friend on the woolsack, and I only desire to add two observations.

I would echo the tribute which has been paid to the judgment of the Master of the Rolls in *Bennett* v. *Marshall*,[18] but I think that one slip appears in that judgment, which was extempore. The learned Master of the Rolls there said[19]: "If I am right in "my view as to the effect of *Foulsham* v. *Pickles*[20] it has the "result in this case that the test for ascertaining the source of "income is to look for the place where the income really comes "to the employee, and that place is Canada. That is where the "source is, and it is outside the United Kingdom." It was immaterial, for the purposes of that case, whether the source of income was the United States of America or Canada, but I should have thought it was the United States, where the respondent's employers resided and whence his pay was remitted to Canada. I make this observation because I am apprehensive that some subtle argument may be based hereafter on this portion of the judgment.

I have formed no view upon the matter discussed by Lord Normand at the end of his speech, as it proved unnecessary to hear any argument thereon.

LORD REID. My Lords, I concur.

LORD COHEN. My Lords, I also agree that these appeals should be dismissed for the reasons given by my noble and learned friend on the woolsack, and would only add that, like my noble and learned friend, Lord Morton of Henryton, I have formed no opinion on the matter discussed by Lord Normand at the end of his speech, as it proved unnecessary to hear any argument thereon.

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[18] [1938] 1 K.B. 591.
[19] Ibid. 611.
[20] [1925] A.C. 458.

Appeals dismissed.

Solicitors: *Solicitor of Inland Revenue; Simmons & Simmons; Linklaters & Paines.*

J. C.*
1953
May 11.

GOVINDAN SELLAPPAH NAYAR KODAKAN PILLAI . . . . APPELLANT;

AND

PUNCHI BANDA MUDANAYAKE AND OTHERS RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Ceylon—Citizenship—Indian Tamils—Franchise—Definitive legislation —Constitutional validity—"Pith and substance" rule—Alternative citizenship qualifications—Ceylon (Constitution and Independence) Order in Council, 1946, *as amended to* 1947, *s.* 29 (2) (*b*)—*Citizenship Act, No.* 18 *of* 1948, *ss.* 4, 5—*Ceylon (Parliamentary Elections) Amendment Act, No.* 48 *of* 1949, *s.* 4 (1) (*a*)—*Indian and Pakistani Residents (Citizenship) Act, No.* 3 *of* 1949.

By section 29 of the Ceylon (Constitution and Independence) Order in Council, 1946, as amended: "(1) . . . Parliament shall "have power to make laws for the peace, order and good government "of the Island. (2) No such law shall . . . (b) make persons of any "community . . . liable to disabilities or restrictions to which "persons of other communities . . . are not made liable; . . ."

The Citizenship Act, 1948, of Ceylon, which provides, inter alia, that a person born outside Ceylon shall have the status of a citizen of Ceylon by descent if his father and paternal grandfather or his paternal grandfather and paternal great grandfather were born in Ceylon, is in pith and substance legislation on citizenship, and that Act and the Ceylon (Parliamentary Elections) Amendment Act, 1949, which provides that a person who is not a citizen of Ceylon shall not be qualified to have his name entered on any register of electors, do not intend to, and do not, impose disabilities on Indian Tamils in Ceylon—the majority of whom would not be entitled to the status of citizenship under the Act of 1948—to which other communities are not liable within the meaning of section 29 (2) (*b*) of the Constitution Order in Council, and the Acts are therefore intra vires the Ceylon legislature.

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* *Present*: LORD NORMAND, LORD OAKSEY, LORD TUCKER, LORD ASQUITH OF BISHOPSTONE, and LORD COHEN.

Standards of literacy, of property, of birth or of residence are standards which a legislature may adopt in legislation on citizenship, and though they may operate to exclude the illiterate, the poor and the immigrant to a greater degree than they exclude other people, those standards do not create disabilities in a community as such, since the community is not bound together as a community by its illiteracy, its poverty or its migratory character, but by its race or its religion. The migratory habits of the Indian Tamils were facts which were directly relevant to the question of their suitability as citizens of Ceylon, but had nothing to do with them as a community.

The legislative plan in Ceylon in relation to citizenship looked at as a whole, however, indicates that the Ceylon legislature did not intend to prevent Indian Tamils from attaining citizenship provided that they were sufficiently connected with the Island, for by the Indian and Pakistani Residents (Citizenship) Act, 1949, an Indian Tamil could obtain citizenship by registration and thus protect his descendants provided that he had a certain residential qualification.

Judgment of the Supreme Court of Ceylon affirmed.

APPEAL (No. 7 of 1952) from a judgment and order of the Supreme Court of Ceylon (September 28, 1951) granting a mandate in the nature of a writ of certiorari quashing an order made by the third respondent (July 2, 1951) that the appellant's name be included in the register of electors for the electoral district 84, Ruwanwella, for the year 1950.

The following facts and statutory provisions are taken from the judgment of the Judicial Committee: The issue for determination in this appeal was whether the Supreme Court of Ceylon were right in holding that sections 4 and 5 of the Citizenship Act, No. 18 of 1948 (hereinafter referred to as the Citizenship Act), and section 4 (1) (*a*) of the Ceylon (Parliamentary Elections) Amendment Act, No. 48 of 1949 (hereinafter referred to as the Franchise Act), were valid, or whether, as contended on behalf of the appellant and as held by the third respondent (hereinafter referred to as the revising officer), those sections were made in contravention of section 29 (2) of the Ceylon (Constitution and Independence) Orders in Council, 1946 and 1947.

By the Ceylon (Constitution and Independence) Order in Council, 1946, as amended: "29. (1) Subject to the provisions "of the Order, Parliament shall have power to make laws for the "peace, order and good government of the Island.

" (2) No such law shall—(*a*) prohibit or restrict the free exercise of any religion; or (*b*) make persons of any community or religion liable to disabilities or restrictions to which persons of other communities or religions are not made liable; or (*c*) confer on persons of any community or religion any privilege or advantage which is not conferred on persons of other communities or religions; or (*d*) alter the constitution of any religious body except with the consent of the governing authority of that body: Provided that, in any case where a religious body is incorporated by law, no such alteration shall be made except at the request of the governing authority of that body.

" (3) Any law made in contravention of subsection (2) of this section shall, to the extent of such contravention, be void."

The Citizenship Act, 1948, provides: " 4 (1) Subject to the other provisions of this Part a person born in Ceylon before the appointed date shall have the status of a citizen of Ceylon by descent if (*a*) his father was born in Ceylon, or (*b*) his paternal grandfather and paternal great grandfather were born in Ceylon.

" (2) Subject to the other provisions of this Part a person born outside Ceylon before the appointed date shall have the status of a citizen of Ceylon by descent if—(*a*) his father and paternal grandfather were born in Ceylon; or (*b*) his paternal grandfather and paternal great grandfather were born in Ceylon.

" 5 (1) Subject to the other provisions of this Part a person born in Ceylon on or after the appointed date shall have the status of a citizen of Ceylon by descent if at the time of his birth his father is a citizen of Ceylon.

" (2) Subject to the other provisions of this Part, a person born outside Ceylon on or after the appointed date shall have the status of a citizen of Ceylon by descent if at the time of his birth his father is a citizen of Ceylon and if, within one year from the date of birth, the birth is registered in the prescribed manner—(*a*) at the office of a consular officer of Ceylon in the country of birth, or (*b*) where there is no such officer, at the appropriate embassy or consulate in that country or at the office of the Minister in Ceylon."

The Franchise Act, as amended in 1950, reads: " (4) (1) no person shall be qualified to have his name entered or retained in any register of electors in any year if such person—(*a*) is not a citizen of Ceylon, or if he is by virtue of his own act, under any acknowledgment of allegiance, obedience or adherence to any foreign Power or State which is not a member of the Commonwealth; . . ."

On January 22, 1951, the appellant filed a claim in the prescribed form pursuant to the Ceylon (Parliamentary Elections) Order-in-Council, 1946, to have his name inserted in or retained on the register of electors for the Ruwanwella electoral district. In a letter annexed to his claim he averred that he was a resident in the electoral district and had been so resident for a continuous period of over six months in the 18 months immediately prior to June 1, 1950; that he was, and had at the relevant period been, a British subject; that he was in no way disqualified to be an elector; and that his name had been included in the register prepared in the year 1949. His letter also included the following passages:—" 9. I claim that the alternatives in the qualification " to be an elector effected by Act 48 of 1949 are not valid and are " of no effect in law inasmuch as the said Act was ultra vires the " legislature. 10. I claim that the qualifications to be an elector " should be determined according to the Ceylon (Parliamentary " Elections) Order-in-Council, 1946, without the same being modi" fied or amended by Act 48 of 1949. According to the said " Order-in-Council as unamended by the said Act 48 of 1949 I am " qualified to be an elector."

On February 26, 1951, the first respondent as assistant registering officer held an inquiry into the appellant's claim at which the appellant gave oral evidence. In answer to the first respondent he stated (inter alia): " I was born in British India. " Both my parents and all my other relations were born in British " India. All my wife's relations are in India except my brother" in-law, who lives with me. I have not sought registration " under the Citizenship Act, No. 18 of 1948, or under the Indian " and Pakistani Residents (Citizenship) Act, No. 3 of 1949. I do " not own any property in India . . . I do not own any property " in Ceylon either."

At the end of the inquiry the first respondent made the following order: " I have rejected this claim as the claimant is not a " citizen of Ceylon within the meaning of the Citizenship Act, No. " 18 of 1948. . . . I accept the statements of fact made by the " claimant before me at this inquiry."

On March 8, 1951, the appellant filed a petition of appeal to the revising officer praying that the order of the registering officer be set aside and that the appellant's name be included in the register of electors. By an affidavit dated May 15, 1951, the appellant deposed (inter alia): " 9. The vast majority of the " present Indian immigrant population came to Ceylon long after " the year 1852, and though a large number of the members of "the community have been born in Ceylon yet their parents were "not born in Ceylon. In the case of the Indian community, unlike in the case of the Singhalese and Ceylon Tamil communities, the fathers of the persons who belong to this community "have not been born in Ceylon as immigration of Indian labour "commenced only in 1852. Hence the Ceylon Citizenship Act, "while it confers the status of a Ceylon citizen on all members "of the Singhalese and Ceylon Tamil communities, fails to confer that status on by far the vast majority of the members of "the Indian community settled in Ceylon."

The revising officer held an inquiry on May 16, 29, and 30, 1951, at which the appellant was represented by Mr. Advocate Nadesan and Mr. Advocate Kanagarayar, and the second respondent by the Attorney-General and Mr. Walter Jayawardene, Crown counsel. On May 16, Mr. Advocate Nadesan moved to file the appellant's aforesaid affidavit dated May 15, 1951. The Attorney-General objected, inter alia, to para. 9 thereof. He raised, however, no objection to the affidavit being filed provided that, if in the course of the argument it became necessary for him either to lead evidence or to file a counter-affidavit, he should be allowed to do so. Mr. Advocate Nadesan had no objection, and the revising officer accordingly admitted the affidavit subject to those conditions. Mr. Advocate Nadesan stated that he did not propose to call any evidence at that stage of the inquiry, and that it would be a matter of legal argument. No further evidence was called.

At the resumed hearing on May 29, the Attorney-General tendered an affidavit dated May 28, 1951, sworn by the registering officer for the Ruwanwella electoral district, but did not contradict the allegations of para. 9 of the appellant's affidavit.

On July 2, 1951, the revising officer gave judgment holding the Acts in question ultra vires on the ground that the Citizenship Act was in no true sense legislation to create the status of citizenship but was, with the Franchise Act, part of a legislative plan to reduce the electoral power of the Indian community.

On July 16 the Attorney-General applied to the Supreme Court of Ceylon for a mandate in the nature of a writ of certiorari to quash the decision of the revising officer. The appellant tendered three affidavits, sworn on August 21, 1951, which purported to deal (inter alia) with the history of Indian immigration into Ceylon and the position of Indian residents under the Citizenship

Act and the Franchise Act, but those affidavits were not admitted by the Supreme Court.

The Supreme Court of Ceylon (Jayetileke C.J., Pulle and Swan JJ.) unanimously granted the application for certiorari, and quashed the order of the revising officer, holding first, that the evidence tendered to them ought not to be admitted, and in any event was irrelevant; secondly, that a court should not search among State papers and other political documents for the substance or the true nature and character of an impugned statute without permitting the language of the statute to speak for itself where such language was clear and unambiguous; and thirdly, that the statutes in question did not upon their faces make the Indian Tamil community liable to any disability to which other communities were not liable.

1953. March 16, 17, 18, 19 and 23. *Pritt Q.C.*, *Gahan Q.C.*, *S. Canagarayar* and *S. Amerasinghe* for the appellant. The main and important question is whether certain recent legislation in Ceylon has the effect of disenfranchising a very high percentage of members of an important and old-standing settled community in Ceylon, the Indian Tamils. The effect of the new legislation is that every person who is a citizen of Ceylon shall be qualified to have his name entered in the register of electors. Practically, the position is that any Indian Tamil, however fully settled in Ceylon, and however unlikely to leave it, still cannot be a citizen of Ceylon unless he can establish that sometimes his father, sometimes his grandfather, and sometimes both, and in some cases his great-grandfather, was born in Ceylon.

The submissions may be outlined in two groups: (1) as to how the subject of examining the constitutional validity or invalidity of the legislation should be approached; and (2) what would be the proper result of applying those principles to this particular legislation. The first group of submissions, on how to approach the problem, fall under three heads: (a) When one comes to examine the impugned legislation from the point of view of its validity under the Constitution one must have regard to all the surrounding circumstances and the contexts of the legislation, including therein the history of the constitutional legislation of the Island. (b) Parliament cannot do indirectly by a colourable device what it is forbidden to do directly and which in fact offends against the Constitution. (c) The court will be astute to see that no colourable device is used to evade the constitutional protections. The court cannot hope to safeguard the subject against

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indirect or colourable legislation unless it has before it the surrounding circumstances and contexts. The second group of submissions rests on section 29 of the Ceylon (Constitution and Independence) Order-in-Council, 1946, as amended.

The Board should approach the protection of a constitutional safeguard as something which is most emphatically not to be evaded in any way. If it can be established that the inevitable effect of the impugned Acts is to deprive over 90 per cent. of the members of the Tamil community of the franchise, which the Constitution is designed to protect, the legislation must be invalid. From beginning to end of this case everyone has assumed, and it is not now disputed, that the Indian Tamils are a community. As a matter of pith and substance the effect, and, it is submitted, the object also, of the impugned legislation is not merely to keep the Ceylon vote to people with true interests in Ceylon, but also to disenfranchise the Indian Tamil community. The material in support of those propositions falls into two categories: (1) (*a*) things like the Soulbury Commission Report and the Donoughmore Commission Report, which nobody has challenged before, which are proper to be read; (*b*) the affidavit of the assistant registrar and the evidence which was given before him—and those carry the appellant a long way; (2) extra affidavits which contain in the main hard statistical facts well established from Government Departments.

The argument on the first group of submissions consists mainly of citing authorities to establish that in order to examine the validity of the impugned Acts the surrounding circumstances, including the history of the Constitution legislation, can be looked at, as also can any further material necessary to establish that the legislature is seeking to do indirectly or by a colourable device something which in fact offends against the Constitution. Reference may first be made to the classic passage from the judgment of Lord Blackburn in *River Wear Commissioners* v. *William Adamson*[1]: "I shall therefore state . . . what I understand . . . "to be the principles on which the courts of law act in construing "instruments in writing; and a statute is an instrument in "writing. In all cases the object is to see what is the intention "expressed by the words used. But, from the imperfection of "language, it is impossible to know what that intention is without "inquiring farther, and seeing what the circumstances were with "reference to which the words were used, and what was the

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[1] (1877) 2 App.Cas. 743, 763.

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"object, appearing from those circumstances. . . ." That is the foundation stone on which so much has been said. *Eastman Photographic Materials Co. Ld.* v. *Comptroller-General of Patents, Designs and Trade Marks* [2] carries the appellant a little farther. The decision which is put in the forefront of the appellant's case is *Attorney-General for Alberta* v. *Attorney-General for Canada*,[3] where it was said: "The next step in a case of difficulty will be "to examine the effect of the legislation. . . . For that purpose "the court must take into account any public general knowledge "of which the court would take judicial notice, and may in a "proper case require to be informed by evidence as to what the "effect of the legislation will be." And in *Ladore* v. *Bennett* [4] Lord Atkin, delivering the judgment of the Board, said that "the "courts will be careful to detect and invalidate any actual violation of constitutional restrictions under pretence of keeping "within the statutory field. A colourable device will not avail." [Reference was also made on this topic to *Herron* v. *Rathmines and Rathgar Improvement Commissioners*,[5] *Gallagher* v. *Lynn* [6] and *Madden* v. *Nelson and Fort Sheppard Railway*.[7]] In this connexion one can also get some substantial assistance from American cases: the real value of those cases is to show, by decisions of courts by which the Board is not bound, that the effect as well as the intent of an Act may be considered, and that any evidence that is necessary may be looked at to show what is the actual effect of the legislation: *Yick Wo* v. *Hopkins* [8]; *Guinn and Beal* v. *United States* [9]; *Myers* v. *Anderson* [10]; *Lane* v. *Wilson* [11]; *Smith* v. *Allwright* [12]; *Schnell* v. *Davis*.[13] That concludes the first part of the argument, and those cases, English, Canadian and American, show that the courts are entitled to look at the effect of the statutes in order to determine whether they are valid or not. *McQuaker* v. *Goddard* [14] refers to the functions of the court in considering things which may be the subject of judicial notice.

[Reference was then made to a number of passages from the Soulbury Commission Report to indicate how those concerned had endeavoured to achieve protection for the Indian Tamil community, to give the background for approaching the construction of section 29 in the Constitution, and to show that the word "community" was constantly used to describe both minorities and various majorities.] Section 29 was intended to provide, and on its proper construction does provide, an effective protection for the various communities in Ceylon; the revising officer was right in considering whether extraneous circumstances showed that the impugned Acts were designed to circumvent the constitutional safeguards and in coming to the conclusion that they were so designed. The courts are entitled to look at the constitutional history of Ceylon and at the evidence showing the intention of the legislators and the effect of legislation whenever it is alleged that it is outside the competence of a legislature, and in the present case the impugned Acts are void under subsection (3) of section 29.

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[2] [1898] A.C. 571; 14 T.L.R. 527.

[3] [1939] A.C. 117, 130; 55 T.L.R. 65.

[4] [1939] A.C. 468, 482; 55 T.L.R. 732; [1939] 3 All E.R. 98.

[5] [1892] A.C. 498, 502.

[6] [1937] A.C. 863, 870; 53 T.L.R. 929; [1937] 3 All E.R. 598.

[7] [1899] A.C. 626; 15 T.L.R. 484.

[8] (1886) 118 U.S. 356.

[9] (1915) 238 U.S. 347.

[10] (1915) 238 U.S. 368.

[11] (1939) 307 U.S. 268.

[12] (1944) 321 U.S. 649, 664.

[13] (1949) 336 U.S. 933.

[14] [1940] 1 K.B. 687; 56 T.L.R. 409; [1940] 1 All E.R. 471.

Gahan Q.C. following. Section 29 (2) of the Order-in-Council is a fundamental safeguard which was intended to be, and is, effective. "The courts," it was said in *Ladore* v. *Bennett*,[15] "will be careful to detect and invalidate any actual violation of "constitutional restrictions under pretence of keeping within the "statutory field." In applying that principle a court should consider what will be the effect of the legislation, and for that purpose should avail itself of any sources of information and, if necessary, receive proof of relevant facts, as was done in the Alberta banking case.[16] The character of the impugned legislation is such that it is an actual violation of the constitutional restrictions which the Board has said the court would be careful to detect and to hold void. Under this legislation the appellant's descendants for all time are barred. The proper deduction to be drawn from the effect of this legislation in preventing descendants who have been connected with the Island for generations from acquiring the franchise is that it establishes that it is a violation of section 29 (2)—it is taking away one of the civil and political rights; it is doing indirectly what it could not do directly, and under the well-settled principles applied by this Board the indirect attempt is as void as the direct legislation would be. Further, by section 29 (3), if there is infringing legislation, it is a nullity. The revising officer rightly held the impugned Acts to be void and he properly directed the appellant's name to be restored to the register.

[15] [1939] A.C. 468, 482; 55 T.L.R. 732; [1939] 3 All E.R. 98.

[16] [1939] A.C. 117, 131; 55 T.L.R. 65.

Sir Hartley Shawcross Q.C., *Sir Frank Soskice Q.C.*, *Dingle Foot*, *Walter Jayawardene* and *Biden Ashbrooke* for the second respondent, the Commissioner of Parliamentary Elections. The scheme of the legislation of which the Citizenship Act forms a part had no "tragic" consequences whatever for the Indian community, for counsel for the appellant omitted to refer to the Indian and Pakistani Residents (Citizenship) Act, 1949, which, as part of the same scheme for creating its new citizenship, was passed by the Ceylon legislature, and under which the Indian Tamils would be entitled to registration as citizens provided that they could prove certain residence qualifications. The period was seven years in the case of married people and ten years in the case of those who were unmarried. There is authority of this Board for the proposition that the presumption is in favour of the laws of a colonial or dominion legislature being within the powers delegated to them. Admittedly, if this impugned legislation turns out to be colourable it is bad; the criterion is the real object, the real intention, of the legislature. It was said for the appellant that this legislation was part of a plan to disenfranchise the Indian Tamils. It is a travesty of the position to suggest that the legislature of Ceylon, newly sovereign though it then was, desired or intended to deprive the Indian community, who had been long and permanently settled in the country, of the ability to acquire full civic rights. Ceylon had just been transferred from Crown colony status to dominion status, and was under the compelling necessity of introducing citizenship legislation. The first limb of the scheme was birth—the father's birth—which made fairly sure that the person to whom citizenship was given was permanently associated with the country; that was permanent legislation to provide for nationality on a permanent basis. The second limb of the scheme was to set up, side by side with the permanent machinery, temporary machinery to enable those Indian and Pakistanis who had been long settled in the country but who did not qualify by the permanent legislation, to elect whether they would become citizens of Ceylon. That was done by the introduction of the Indian and Pakistani Residents (Citizenship) Act, 1949, which was introduced immediately after the passage of the Citizenship Act, 1948. If there can be evidence of extraneous facts from which the court is entitled to infer an intention, a colourable device, to disenfranchise a particular section of the community, equally there can be evidence to show that in truth and in fact that was manifestly not the intention at all, and it is in that sense that reliance is placed on the Act of 1949. If the submission which will be made, to the effect that section 29 of the Order-in-Council has no application to citizenship legislation, turns out to be ill-founded, it may be argued that the Act of 1949 also offends against the principles of section 29, not because it displaces Indian Tamils, but, on the contrary, because it confers on them a privilege which is not at the same time conferred on members of other communities. The fact that it may be technically bad, however, does not help the appellant's case that the scheme was a colourable device. That particular defect of the Act of 1949 can be cured.

Subsequent statutes in pari materia can be looked at to see what is the proper construction to put upon an earlier one. The Citizenship Acts of 1948 and 1949 are obviously in pari materia, and form part of a single legislative machinery to provide citizenship, and taken together, as they should be, they show that the pith and substance—the object and purpose—of the Act of 1948 was not to disenfranchise any considerable section of the Indian community, but, on the contrary, to create proper qualifications for citizenship. Both those Acts were passed before the Franchise Act itself was passed. There is no question at all of colourable device here. On the facts of this case the appellant could have obtained citizenship under the Act of 1949.

The following propositions are submitted: first, the court cannot consider and decide whether any, and if so what, extraneous evidence is admissible to show that a constitutional limitation on legislative powers has been infringed without first deciding what that constitutional limitation in law is. Secondly, section 29 of the Order-in-Council prohibits only enactments which directly discriminate against the community as such. Thirdly, the pith and substance of the impugned Acts were to deal properly and necessarily with the citizenship and the franchise; and it is not in point that in dealing with these legitimate matters an ulterior, albeit necessary, consequence was that one community was affected either beneficially or detrimentally more than another, that being an incident of virtually all legislation in those fields. Fourthly, if evidence is admissible at all, it must show that substantially the whole of a community has been disabled or privileged. It is extremely doubtful whether evidence is admissible: apart from the *Attorney-General for Alberta* case,[17] there is no case in which evidence has ever been received, and all the observations about evidence are obiter in the other cases. Lastly, section 29 of the Order-in-Council has no application to citizenship legislation.

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[17] [1939] A.C. 117; 55 T.L.R. 65.

With regard to the first of the above propositions, it is self-evident that before any evidence as to the effect of the statute can be given—and in any event it is submitted that no evidence as to the effect can be received at all—the meaning of the statute must first be construed; then, if evidence is admissible at all, one must see on what circumstances the statute so construed will operate. With regard to the admissibility of evidence the cases, which really all stem from *Heydon's* case,[18] have only admitted evidence, if at all, in relation to interpretation and not effect.

On the second proposition—the proper construction of section 29 of the Order-in-Council—the section really does no more than it says, namely, it prohibits only direct, as distinct from incidental or collateral, discrimination against or in favour of a community as such. Section 29 (2) as a whole means that no law shall of itself (a) prohibit or restrict, (b) make, (c) confer—bestow upon, (d) alter something in relation to a community. If the substance of the statute taken as a whole is to bring about a permitted result, then the fact that indirectly social, economic or political results fall within the prohibited field does not matter. The principles in *Commonwealth of Australia* v. *Bank of New South Wales*[19] apply directly to the present case. What in effect the Privy Council were saying in that case was that the courts will consider the necessary effect in law; they will not look at the de facto result; and it was decided there that the legislation directly did that which was forbidden.

On the question of "pith and substance," it is submitted that the true character of the Citizenship Act was to deal with a proper subject of legislation and to remedy an undoubted mischief, and that therefore ulterior consequences were immaterial. The only cases in which legislation, good on the face of it, has been successfully impugned were where in effect the forbidden result was achieved by a trick or a colourable device. There is nothing of that kind here. If the Citizenship Act is good, the position in regard to the Franchise Act is a simple one. The construction of the Citizenship Act of 1948 cannot be controlled by the subsequent Act of 1949, but in deciding whether the earlier Act was colourable the whole scheme must be looked at. Questions of policy cannot be gone into: *King-Emperor* v. *Benoari Lal Sarma.*[20]

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[18] (1584) 2 Coke (Bk. 3) 7a.

[19] [1950] A.C. 235, 307–10; 65 T.L.R. 633; [1949] 2 All E.R. 755.

[20] (1944) L.R. 72 I.A. 57, 70.

Even if the collateral arrangement made by the Act of 1949 for the Indians and Pakistanis who had a long period of residence in Ceylon be ignored, it is right for a State in the position of Ceylon to insist on the qualification of a long family association with the territory. There is nothing in the Act of 1948 which strikes at any community; there is no selective test at all. The Franchise Act of 1949 stands or falls on the citizenship legislation; it makes the right to vote dependent on being a citizen of Ceylon. If it is right that on the face of those statutes their pith and substance is citizenship legislation, then evidence as to ulterior consequences and results, however clear those results may be, does not really carry the case any further. In this case the pith and substance appears from the matters of which the court can undoubtedly take judicial notice, including the Soulbury Commission Report, and from the face of the Acts themselves.

With regard to the admissibility of evidence in such a case as this, until *Attorney-General for Alberta* v. *Attorney-General for Canada* [21] the matter of the admission of evidence as distinct from documents which were within judicial notice appeared never to have arisen, certainly not in regard to evidence which went not as to mischief, which would help on interpretation, but as to effect. As submitted earlier, the present law stems from *Heydon's* case.[22] [Reference in this connexion was also made to the following authorities: *Attorney-General for British Columbia* v. *Attorney-General for Canada* [23]; *Megh Raj* v. *Allah Rakhia* [24]; *State of West Bengal* v. *Anwar Ali Sarkar* [25]; *Attorney-General* v. *Sillem and Others* [26]; *Rex* v. *West Riding of Yorkshire County Council* [27]; and *Ladore* v. *Bennett*.[28]] The latest decision, the *Australian Bank* case,[29] is of real authority here and seems to suggest that the statute itself must be looked at. [On the question of judicial notice, reference was made to the Evidence Ordinance (Legislative Enactments of Ceylon, 1938 Rev., vol. 1, c. 11).] The appellant has not discharged the onus, which is upon him, of showing that this was colourable legislation of the nature he submitted; there is no evidence to justify such a conclusion.

Pritt Q.C. in reply. The Act of 1949 cannot help to destroy the argument for the appellant about colourable legislation, because that Act is obviously bad as conferring a privilege on one community only; and the submission for the respondent that if it is void the Ceylon Government will validate it would hardly make any difference to the argument here. If the main Citizenship Act was bad when it was passed, as it is submitted it was, it cannot be brought back to light by the enactment of the subsequent Act of 1949. Section 29 of the Order-in-Council presents an absolute bar to any legislation which infringes section 29 by discriminating against persons of any community. The appellant's case may be put in three ways. First, if the legislation in fact infringes the constitutional bar, that is enough to make it bad, and equally so whether it does it directly or indirectly. If that is right, the pith and substance problems need not be considered. Secondly, and alternatively, in pith and substance the impugned Acts are discriminatory Acts. Thirdly—and really a corollary to the second—the Acts are a colourable device. [Reference was made to *Attorney-General for Manitoba* v. *Attorney-General for Canada*[30]; *Attorney-General for Canada* v. *Attorney-General for Ontario*[31]; *Gallagher* v. *Lynn*.[32]] The Citizenship Act is one which discriminates against the Indian Tamil community because it deprives of citizenship for generations to come whole masses of the Indian Tamil community. It is bad from the start, and the Franchise Act is also bad a fortiori. Lastly, one is entitled to look at the history and surrounding circumstances and the effect of the Act in order either to construe it or to ascertain its validity. [Reference was made to a number of the authorities previously cited in this connexion.]

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[21] [1939] A.C. 117; 55 T.L.R. 65.

[22] 2 Coke (Bk. 3) 7a.

[23] [1937] A.C. 377, 388; 53 T.L.R. 330.

[24] A.I.R. (1942) (Fed.Ct.) 27.

[25] A.I.R. (1952) (Sup.Ct.) 75.

[26] (1863) 2 H. & C. 431.

[27] [1906] 2 K.B. 676; 22 T.L.R. 783.

[28] [1939] A.C. 468; 55 T.L.R. 732; [1939] 3 All E.R. 98.

[29] [1950] A.C. 235; 65 T.L.R. 633; [1949] 2 All E.R. 755.

May 11. The judgment of their Lordships was delivered by LORD OAKSEY, who stated the facts set out above and continued: At their Lordships' Board it was contended on behalf of the appellant that the Citizenship Act and the Franchise Act make persons of the Indian Tamil community, of which the appellant is a member, liable to a disability or restriction within the meaning of section 29 (2) (*b*) of the Constitution Order-in-Council and are therefore ultra vires.

It was conceded for the appellant that these Acts do not upon their faces discriminate against the Indian Tamil community, but it was argued that they indirectly have that effect since on the evidence before the court, and as was conceded by the Attorney-General, a large number of Indian Tamils cannot become citizens

[30] [1929] A.C. 260; 45 T.L.R. 146.

[31] [1937] A.C. 355; 53 T.L.R. 325.

[32] [1937] A.C. 863; 53 T.L.R. 929; [1937] 3 All E.R. 598.

of Ceylon because neither their fathers nor their grandfathers were born in Ceylon. It was further argued for the appellant that the Acts were what was called colourable, and that they disclose, when their pith and substance or their true character is ascertained, the intention of the legislature to do indirectly what admittedly it cannot do directly, namely, to make persons of the Indian Tamil community liable to a disability to which persons of other communities are not made liable.

The appellant's counsel at first submitted that further evidence ought to be admitted as to the effect of the Acts upon the Indian Tamil community, but in reply he expressly withdrew his application to introduce further evidence and no further evidence was referred to.

In these circumstances, and in view of the admission before the revising officer of the affidavit of the appellant dated May 15, 1951, without objection, their Lordships do not find it necessary to decide if and how far evidence is admissible of facts which go to show the actual effect of an Act after it has been passed. It was common ground between the parties, and is in their Lordships' opinion the correct view, that judicial notice ought to be taken of such matters as the reports of Parliamentary Commissions and of such other facts as must be assumed to have been within the contemplation of the legislature when the Acts in question were passed (*cf. Ladore* v. *Bennett* [1]), and both parties have referred their Lordships to a number of paragraphs in the report of the Soulbury Commission of 1945.

With much of the reasoning of the Supreme Court of Ceylon their Lordships find themselves in entire agreement, but they are of opinion that there may be circumstances in which legislation, though framed so as not to offend directly against a constitutional limitation of the power of the legislature, may indirectly achieve the same result, and that in such circumstances the legislation would be ultra vires. The principle that a legislature cannot do indirectly what it cannot do directly has always been recognized by their Lordships' Board, and a legislature must, of course, be assumed to intend the necessary effect of its statutes. But the maxim omnia praesumuntur rite esse acta is at least as applicable to the Act of a legislature as to any other acts, and the court will not be astute to attribute to any legislature motives or purposes or objects which are beyond its power. It must be shown affirmatively by the party challenging a statute which is upon its face intra vires that it was enacted as part of a plan to effect indirectly something which the legislature had no power to achieve directly.

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[1] [1939] A.C. 468, 477; 55 T.L.R. 732; [1939] 3 All E.R. 98.

It was argued that sections 4 and 5 of the Citizenship Act made it impossible that the descendants, however remote, of a person who was unable to attain citizenship himself could ever be able to attain citizenship in Ceylon no matter how long they resided there, but their Lordships' attention was subsequently drawn to the Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949, by which an Indian Tamil could by an application obtain citizenship by registration and thus protect his descendants, provided he had a certain residential qualification. It was suggested on behalf of the appellant that this Act might itself be ultra vires as conferring a privilege upon Indian Tamils within section 29 (2) (*c*) of the Constitution Order-in-Council, and that therefore it was inadmissible to rebut the inference that the legislature had intended by the Citizenship and Franchise Acts to make Indian Tamils liable to disabilities within the meaning of section 29 (2) (*b*), but their Lordships cannot accept this argument. If there was a legislative plan the plan must be looked at as a whole, and when so looked at it is evident, in their Lordships' opinion, that the legislature did not intend to prevent Indian Tamils from attaining citizenship provided that they were sufficiently connected with the island.

The cases which have been decided upon the British North America Act, 1867, and the Australian Constitution have laid down the principle which their Lordships think is applicable to the present case, although it is true that in those cases the question was as to the construction of legislative subjects assigned to the Dominion or Commonwealth Parliaments on the one hand and to the legislatures of the Provinces or States on the other, whereas in the present case the question is as to the construction of a constitutional limitation upon the general sovereign power of the Ceylon legislature to legislate for the peace, order and good government of Ceylon. But in their Lordships' opinion the question for decision in all these cases is in reality the same, namely, what is the pith and substance, as it has been called, or what is the true character of the legislation which is challenged (see *Attorney-General for Ontario* v. *Reciprocal Insurers* [2] and *Prafulla Kumar* v. *Bank of Commerce Khulna* [3]).

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[2] [1924] A.C. 328–37; 40 T.L.R. 273.

[3] (1947) L.R. 74 I.A. 23.

Is it in the present case legislation on citizenship, or is it legislation intended to make and making Indian Tamils liable to disabilities to which other communities are not liable? It is, as the Supreme Court observed, a perfectly natural and legitimate function of the legislature of a country to determine the composition of its nationals. Standards of literacy, of property, of birth or of residence are, as it seems to their Lordships, standards which a legislature may think it right to adopt in legislation on citizenship, and it is clear that such standards, though they may operate to exclude the illiterate, the poor and the immigrant to a greater degree than they exclude other people, do not create disabilities in a community as such since the community is not bound together as a community by its illiteracy, its poverty or its migratory character, but by its race or its religion. The migratory habits of the Indian Tamils (see paragraphs 123 and 203, Soulbury Report) are facts which, in their Lordships' opinion, are directly relevant to the question of their suitability as citizens of Ceylon and have nothing to do with them as a community.

For all these reasons their Lordships have come to the conclusion that the Citizenship and Franchise Acts are intra vires of the Ceylon legislature and they therefore humbly advise Her Majesty that this appeal ought to be dismissed. The appellant must pay the costs of the appeal.

Solicitors: *Lee & Pembertons; Burchells.*

J. C.*
1953
June 17.

MAURICE ROY MUSSON AND ANOTHER . . APPELLANTS;

AND

THELMO L. RODRIGUEZ . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF TRINIDAD AND TOBAGO.

Trinidad and Tobago—Prohibited immigrant—Decision of Governor-in-Council — Strict compliance with statutory requirements — Written document as essential evidence of decision—Immigration (Restriction) Ordinance, 1936 (*as amended in* 1943) (*c.* 20, *No.* 2), *s.* 4 (1) (*h*)—*Interpretation Ordinance* (*c.* 1, *No.* 2), *s.* 19.

By section 4 of the Immigration (Restriction) Ordinance of Trinidad and Tobago: "(1) The following persons . . . are

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* *Present*: LORD NORMAND, LORD REID, SIR LIONEL LEACH, and MR. L. M. D. DE SILVA.

"prohibited immigrants:— . . . (*h*) any person who from information or advice which in the opinion of the Governor-in-Council is "reliable information or advice is deemed by the Governor-in-"Council to be an undesirable inhabitant of or visitor to the "Colony . .. . (3) No appeal shall lie against the decision of the "Governor-in-Council in regard to any persons mentioned in "paragraphs . . . (*h*). . . ."

Since the power given by section 4 (1) (*h*) of the Ordinance to the Governor-in-Council to interfere with personal liberty may be exercised without any antecedent judicial inquiry and without the persons affected having had any opportunity of making representations, and the decision is not subject to any appeal, there must be the strictest compliance with the provisions by which it is granted. It must be clear beyond question that the Governor-in-Council on information or advice which in his opinion was reliable had come to a definitive decision to deem the person an undesirable inhabitant or visitor. It is further necessary that the decision shall be in such a form that it can be repeated in the notice served on the person affected and become the foundation of any proceedings for his removal.

Section 19 of the Interpretation Ordinance of the Colony, which provides that when power is given to the Governor to make any order or to give any direction, it shall be sufficient for such order or direction to be signified under the hand of the Colonial Secretary, applies to a decision under section 4 (1) (*h*) of the Immigration (Restriction) Ordinance, and therefore a writing under the hand of the Colonial Secretary is the appropriate means of publishing the decision so that it may be acted on. Oral proof of the decision therefore falls short of the requirements of section 19 of the Interpretation Ordinance and is an insufficient mode of proof, and evidence of the decision can only properly be given by way of a written document showing on the face of it that the decision was arrived at in compliance with the terms of, and in accordance with the requirements of section 4 (1) (*h*).

Judgment of the Supreme Court of Trinidad and Tobago reversed.

Appeal (No. 39 of 1952), in forma pauperis, from a judgment of the Supreme Court of Trinidad and Tobago (April 25, 1952) dismissing an appeal from a magistrate's order (March 27, 1952) made under the Immigration (Restriction) Ordinance, c. 20, No. 2, which had directed that the appellants should be removed from the Colony and detained in custody in the meanwhile. The judgment of the Supreme Court was by a majority consisting of Furness-Smith C.J. and Vincent Brown J. Duke J. dissented.

The following facts are taken from the judgment of the Judicial Committee: The proceedings were commenced on February 26, 1952, by the respondent, an immigration officer of the Colony, who as complainant swore an information before a justice of the peace that each of the appellants "being a prohibited "immigrant, and having been ordered to leave the Colony by the "25th instant, did fail to leave the Colony as so ordered as aforesaid contrary to section 19, c. 20, No. 2," and applied for warrants for their arrest. The justice of the peace granted the warrants and the appellants were arrested and brought before the magistrate on March 1 to answer the complaint. They pleaded not guilty. Evidence was then taken. On March 8 the complaint was amended on the motion of the Solicitor-General by the addition of an application for an order for the removal of the appellants from the Colony in accordance with section 23 (1) of chapter 20, No. 2. Further evidence was then taken, and on March 27, 1952, the magistrate made the order, subsequently confirmed by the Supreme Court, against which this appeal was taken.

1953. May 12. *Pritt Q.C.* and *Ralph Millner* for the appellants.

Granville Sharp Q.C. and *J. G. Le Quesne* for the respondent.

Liversidge v. *Anderson* [1] was cited in argument.

June 17. The judgment of their Lordships was delivered by LORD NORMAND, who stated the facts set out above and continued: Much of the evidence adduced by the Crown before the magistrate was directed to proving that the Governor-in-Council had, in the words of the notices served on the appellants before the commencement of the legal proceedings, deemed the appellants to be undesirable visitors to the Colony and therefore prohibited immigrants under section 4 (1) (*h*) of the Immigration (Restriction) Ordinance, c. 20, No. 2. These notices required them to depart from the Colony on or before February 14, 1952. Later notices had extended the date from February 14 to 25, 1952.

The appellants' counsel took the fundamental objection that oral evidence to prove that the Governor-in-Council made the order alleged was inadmissible. He said, further, that, if admissible, it was unsatisfactory and did not establish the fact to be proved.

The basis for the whole proceedings that have taken place is section 4 (as amended) of the Immigration (Restriction) Ordinance, c. 20, No. 2. The following are the material words. "4. (1) The following persons . . . are prohibited immigrants:—

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[1] [1942] A.C. 206; 58 T.L.R. 35;
[1941] 3 All E.R. 338.

"(*h*) any person who from information or advice which in the "opinion of the Governor-in-Council is reliable information or "advice is deemed by the Governor-in-Council to be an undesir-"able inhabitant of or visitor to the Colony . . . (3) No appeal "shall lie against the decision of the Governor-in-Council in "regard to any persons mentioned in paragraphs . . . (*h*) . . . of "subsection (1) of this section unless such appeal be directed to "identity only of the person affected by the decision." There are in other sections (among them section 23) of the Ordinance provisions for enforcing the removal of prohibited immigrants.

The drastic power given to the Governor-in-Council by section 4 (1) (*h*) to interfere with personal liberty may be exercised without any antecedent judicial inquiry, and without the persons who are affected having had any opportunity of making representations. It is not subject to any appeal to a court of law or to any form of review at the instance of the affected persons. When such a power is committed to the Governor-in-Council there must be the strictest compliance with the provisions by which it is granted; it must be clear beyond question that the Governor-in-Council on information or advice which in his opinion was reliable had come to a definitive decision to deem the person an undesirable inhabitant or visitor. It is further necessary that the decision shall be in such a form that it can be repeated in the notice served on the person affected and become the foundation of any proceedings for his removal. Counsel for the appellants argued that the only way by which the necessary certainty in so important a transaction could be achieved was by recording the decision in writing, and that the only competent mode of proving the decision was by the production of the written decision or a statutory equivalent.

The respondent's counsel pointed out that the Immigration (Restriction) Ordinance contains no provision requiring that the decision shall be recorded in writing, and he argued that parole proof was competent unless expressly excluded. Their Lordships consider that it would be unfortunate if the proof of the decision of the Governor-in-Council under section 4 (1) (*h*) of this Ordinance were to be subject to the uncertainties which attend proof by oral evidence. But it is not necessary to consider whether from the provisions of the Immigration (Restriction) Ordinance alone it should be implied that proof by oral evidence is inadmissible. For in their Lordship's opinion section 19 of the Interpretation Ordinance (c. 1, No. 2) applies to a decision under the Immigration (Restriction) Ordinance, section 4 (1) (*h*). Section 19 provides that when power is given to the Governor to make any order or give any direction, it shall be sufficient, unless it is otherwise expressed, for such order or direction to be signified under the hand of the Colonial Secretary. A decision by the Governor-in-Council under the Immigration (Restriction) Ordinance, section 4 (1) (*h*), is a decision by the Governor within the meaning of section 19 of the Interpretation Ordinance, for by section 2 of the Interpretation Ordinance " Governor-in-Council " is defined as meaning the Governor acting with the advice of the Executive Council but not necessarily in accordance with such advice, and that exactly describes the position of the Governor-in-Council under section 4 (1) (*h*) of the Immigration (Restriction) Ordinance. The respondent's counsel submitted that a decision under section 4 (1) (*h*) is not an " order," but their Lordships see no reason to restrict the meaning of " order " in the Interpretation Ordinance in this way.

If, then, section 19 of the Interpretation Ordinance applies, it carries the plain implication that anything less than a signification of the decision of the Governor-in-Council under the hand of the Colonial Secretary would be insufficient. A writing under the hand of the Colonial Secretary is the appropriate means of publishing the decision so that it may be acted on. Oral proof falls short of the requirements of section 19 and is an insufficient mode of proof. Their Lordships do not suggest that it is not competent to prove the decision by producing, for example, a writing under the Governor's hand. But they are in agreement with the judgment of Duke J. that evidence of the decision of the Governor-in-Council " could only properly be given by way " of a written document showing on the face of it, that the " decision was arrived at in compliance with the terms of and in " accordance with the requirements of section 4 (1) (*h*)." No such written document has been produced by the Crown in this case. Counsel for the respondent put forward the notices served on the appellants as sufficient written evidence. But the serving of the notices was no more than an executive act by a subordinate officer purporting to proceed on a decision of the Governor-in-Council which they did not prove or profess to prove. The notices are not the equivalent of a writing under the hand of the Colonial Secretary signifying in clear terms the decision of the Governor-in-Council made in accordance with the requirements of section 4 (1) (*h*).

The result is that there is no competent proof that the

Governor-in-Council came to the alleged decision, and the appeal must succeed.

It thus becomes unnecessary to consider the parol evidence or the criticism to which it has been subjected. It is also unnecessary to consider the propriety of the procedure followed in the magistrate's court, or the contention put forward in the appellants' case that the provisions of the Immigration (Restriction) Ordinance are repugnant to the British Nationality Act, 1948. These are matters which do not now arise and their Lordships have formed no opinion on them.

Their Lordships will humbly advise her Majesty that the appeal should be allowed and the judgment of the Supreme Court set aside, with costs. The appellants are entitled to their costs in the appeal on the pauper scale.

Solicitors: *Hy. S. L. Polak & Co.; Burchells.*

[HOUSE OF LORDS.]

LONDON COUNTY COUNCIL . . . APPELLANTS;

AND

MARKS & SPENCER LD. AND OTHERS . . RESPONDENTS.

H. L. (E.)*
1953
Mar. 10, 11:
Apr. 20.

Town and Country Planning—Development begun before appointed day—Permission to erect buildings granted in 1938*—Permission conditional on completion of work within* 18 *months—No reason given for condition—Validity of condition—Site cleared but rebuilding not begun before July* 1, 1948*—Whether fresh planning permission required—Meaning of "works"—Town and Country Planning Act,* 1932 (22 *&* 23 *Geo.* 5, *c.* 48), *s.* 10 (3)*—Town and Country Planning Act,* 1947 (10 *&* 11 *Geo.* 6, *c.* 51), *s.* 78 (1).

On June 16, 1938, a company applied to the London County Council under the Town and Country Planning Act, 1932, and the Town and Country Planning (General Interim Development) Order, 1933, for permission to erect certain specified buildings in accordance with the terms of a building agreement relating to a site on which other buildings were standing. Permission was granted by letter dated August 9, 1938, for the erection of the buildings, subject to the condition that the work should be completed within 18 months, failing which the consent was to become void, and to five further conditions. No reason was ever given for imposing the conditions. In 1939 the company entered into a contract with a firm of contractors for the demolition of the existing buildings on the site. This work was completed before August, 1939, but no contract was entered into before war broke out in September, 1939, for the erection of the new buildings. The company never abandoned the intention to erect the buildings but nothing more was done until November, 1948, when it notified the council that it was proposing to proceed with their erection. The council, purporting to act under the Town and Country Planning Act, 1947, refused to sanction what was described as development of the site. The company thereupon applied to the Central Land Board for exemption from the payment of development charge. That application was refused:—

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* *Present*: LORD NORMAND, LORD OAKSEY, LORD MORTON OF HENRYTON, LORD REID and LORD COHEN.

Held, (1) that the words "works for the erection . . . of a "building" in section 78 (1) of the Town and Country Planning Act, 1947, meant, in relation to the present case, the totality of the works on the site necessary to carry out the building project authorised in 1938, beginning with the work of demolition, and did not refer only to building operations of a constructional nature; and (2) that the words "decided to the contrary" in section 10 (3) of the Town and Country Planning Act, 1932, meant "decided "not to grant the application unconditionally."

Accordingly, before July 1, 1948, the appointed day under the Act of 1947, the company had begun but not completed works for the erection of the building and, in terms of section 78 (1) of the Act of 1947, it was deemed to have a valid planning permission for the works, on the footing that, since no reasons for the imposition of the conditions attached to the permission of August 9, 1938, had ever been given, then, in terms of section 10 (3) of the Act of 1932, the council must be deemed to have granted unconditional permission for the completion of the works. Thus the company was entitled to complete the building without further permission of the local planning authority and without payment of a development charge.

Decision of the Court of Appeal (sub nom. *Marks & Spencer Ld.* v. *London County Council*) [1952] Ch. 549; [1952] 1 T.L.R. 1276; [1952] 1 All E.R. 1150, affirmed.

Appeal from the Court of Appeal (Jenkins and Morris L.JJ., Evershed M.R. dissenting).

This was an appeal from an order dated April 1, 1952, of the Court of Appeal, which reversed a judgment of Harman J. and declared that, by virtue of section 78 of the Town and Country Planning Act, 1947, the respondents, Marks & Spencer Ld., must be deemed to have been granted permission by the London County Council under Part III of the said Act for the completion of work for the erection of an office building on the site of Nos. 42–48

Paddington Street and 62–72 Chiltern Street, St. Marylebone, in the County of London, in accordance with certain plans submitted to the London County Council, and that no development charge could lawfully be determined by the respondents, the Central Land Board, to be payable in respect of the completion of the said works for the erection of the said office building.

The facts were summarized by Lord Normand as follows: Marks & Spencer Ld. entered into a building agreement with the freeholder of the site, binding themselves to erect a building in accordance with plans and specifications approved by the freeholder. They also obtained on August 9, 1938, from the London County Council a planning permission or order under the Town and Country Planning Act, 1932, and the Town and Country Planning (General Interim Development) Order, 1933, for the erection of the new office building illustrated in plans submitted with the application for permission. The permission was expressly subject to certain conditions of which only the first was material. It ran: ". . . subject to (1) The work " being commenced within six months and completed within 18 " months from August 1, 1938, failing which the consent shall " become null and void." There were on the site certain buildings the demolition of which was essential to the completion of the proposed office building. In 1939 Marks & Spencer Ld. entered into a contract with a firm of demolition contractors to do the necessary work of taking down the existing buildings and clearing and preparing the site. Those works were completed by the end of July, 1939. No contract was made for the erection of the building and no constructive work was begun. The reason for that was the anxious international situation then existing, and subsequently the war prevented until 1948 any attempt to proceed with the building. But Marks & Spencer Ld. never at any time abandoned their intention to complete the building for which they had obtained the planning permission.

The material statutory enactments are set out in the opinion of Lord Normand.

Lawrence Q.C. and *Hugh Francis* for the appellants, the London County Council. Under the Town and Country Planning Act, 1932, the final position was governed by zones of development, and a person undertaking development would not require permission for it, provided that it was in accordance with the primary use to which the zone was dedicated, but, in the case of development for a secondary use, permission would be required.

By the Town and Country Planning Act, 1947, the position was radically altered, the Act of 1932 being repealed in toto. It provided for development plans by various planning authorities, and these plans, instead of being hard and fast schemes, showed the development likely to take place in the next few years. It envisaged a very extended period of interim development. It also brought about a revolution by the introduction of the development charge. Every developer was to be obliged to apply for planning permission and to pay the development charge assessed by the Central Land Board. In the Act of 1932 section 17 was the only section dealing with the demolition of buildings, and it is the foundation of the submission that in general no planning permission was required for demolition. See also the definition of "development" in section 52, indicating that planning permission was required only for building or rebuilding operations or change of user. An understanding of the effect and nature of demolition under the old law is crucial in the construction of section 78 of the Act of 1947.

The mere action of demolition was not under the Act of 1932 an operation requiring planning consent, and it was not "works "for the erection . . . of a building" within section 78 (1) of the Act of 1947, nor was it works which "could have been completed "in conformity with the provisions of a planning scheme or of "permission granted thereunder." Under the Act of 1932 mere demolition did not require the consent of the planning authority, though if it was followed by a change of user planning permission was required, but that was in respect of the change of user and not of the demolition. What is being looked at in section 78 of the Act of 1947 is matters which are properly the subject of planning permission. Accordingly, nothing has so far been done in the circumstances of the present case which is within the section, since "works for the erection . . . of a building" refer to building operations of a constructional nature and not to operations consisting of demolition or the clearance of a site. The action of demolition is equivocal since the buildings concerned might be derelict and useless. Here there was ordinary demolition with no element of construction and the demolition is complete. Section 78 refers exclusively to works requiring planning permission and not to works which are merely preliminary to such works. "Works for the erection . . . of a building" is equivalent to the totality of works comprised in a controlled operation, so that if "works" is interpreted as "controlled works" the dividing line is clear. The test is objective and not subjective, and to bring themselves within section 78 the respondents must show (a) that they have begun works for the erection of a building; (b) that they have not been completed; and (c) that they are a controlled operation. But if a friend of a director of the respondent company had gone on to the site and asked him if they had begun any works for the erection of a new building, the reply would have been that they had not, for they had merely pulled down the old building.

Section 78 is an exempting section and it is meant to cover the whole field of permitted development. If the construction of subsection (1) accepted by the Court of Appeal were to stand, it would produce anomalous results in relation to the powers and duties of the planning authority under sections 21, 22, 28 and 30 of the Act, since an operation would be within section 78 and yet the authority could not exercise its powers of control in relation to it. It would also produce the result of the respondent company being able to erect a building without paying any development charge.

As to the contention that under section 10 (3) the council must be deemed to have granted permission, the council, by attaching conditions to the permission of August 9, 1938, had not " decided " to the contrary " within the subsection and accordingly were not put under the obligation of " stating their reasons for so doing." " Decided to the contrary " means " decided not to grant the " application." The difficulties disappear if the word " contrary " is taken as meaning the contrary of a grant, viz., a refusal. Since the respondent company have failed to comply with the conditions imposed, the consent is null and void.

Hugh Francis following. In construing section 10 (3) of the Act of 1932 it is permissible to compare it with section 2 (3) of the Town and Country Planning (Interim Development) Act, 1943. Both are in pari materia and the later Act may be looked at to explain ambiguous passages in the earlier Act. In particular, it is to be noted that section 2 (5) requires reasons to be given even where permission is granted subject to conditions. Even if it be held that the phrase " decided to the contrary " in section 10 (3) of the Act of 1932 includes a grant of permission subject to conditions, the mere omission to state reasons in the notice itself does not prevent it being a notice of a decision to the contrary. The words " stating their reasons for so doing " should be treated as being parenthetical, so as not to bring the deemed permission into operation if they are not observed. The language of the section does not make it obligatory to hold that the reasons must be stated in the notice itself. The decision of the Court of Appeal would lead to the extraordinary result that if a local authority gave a notice of refusal without stating any reasons, and the applicant did nothing about it, then by merely waiting two months he would obtain an unqualified deemed approval. The object of the enactment was to prevent undue delay, and the mere statement of reasons is not germane to that object. On the respondent company's case, provided an authority stated a reason, however bad, a deemed permission would not arise. It would be absurd if merely because the authority gave no reason a deemed permission should arise.

In section 78 (1) of the Act of 1947 the word "works," the key word, means something having a physical presence or being, and should not be construed as "operations," which means something different. An operation is an activity, while "works" means something which can be said to exist. In sections 75 and 76 the word "works" is used to denote physical things. It is doubtful whether building materials dumped on a site are "works."

Capewell Q.C., *J. Ramsey Willis* and *Vivian Pennington* for the respondent company were not called on to argue.

Denys Buckley for the respondents, the Central Land Board, was not called on to argue.

Their Lordships took time for consideration.

April 20. Lord Normand stated the facts and continued: My Lords, the first question in this case depends upon the proper construction of section 78 (1) of the Act of 1947. This section in effect grants an exemption from other provisions of the Act which require that a planning permission shall be obtained in respect of any development of land carried out after the appointed day (July 1, 1948), and impose development charges in respect of the carrying out of operations for which a planning permission under the Act is required. The material words of section 78 (1) are: "Subject to the provisions of this section, where any works for "the erection or alteration of a building have been begun but not "completed before the appointed day, then if immediately before "that day those works could have been completed . . . in accord-"ance with permission granted by or under an interim develop-"ment order, . . . planning permission shall, by virtue of this "section, be deemed to be granted under Part III of this Act in "respect of the completion of those works." Marks & Spencer

Ld. contend that the phrase "works for the erection . . . of a "building" means, in relation to the present case, the totality of the physical works upon the site necessary to carry out their building project, as authorized in 1938, beginning with the work of demolition and ending with the completion of the building. The London County Council contends that these words refer only to building operations of a constructional nature and not to operations consisting in demolitions or in the clearance of the site. On this issue Harman J. and, in the Court of Appeal, the Master of the Rolls, were in favour of the London County Council, but Jenkins and Morris L.JJ. found in favour of Marks & Spencer Ld.

My Lords, the question lies in a small compass and I find myself wholly in agreement with the reasoning and the conclusion of Jenkins and Morris L.JJ. I shall not repeat what they have said, and I could not find words more apt to express my own views than are to be found in their opinions.

It is nevertheless proper that I should give reasons for differing from the opinions of Harman J. and of the Master of the Rolls, and that I should consider some aspects of the arguments addressed to us by Mr. Lawrence for the appellants, which were not fully dealt with in the judgments of Jenkins and Morris L.JJ. Harman J. in his judgment held that it was a question of fact whether at the critical date "works for the erection . . . of a building" had been begun but were not finished on the site, and so far I agree with him. But he appears to have thought that the crucial point in the case was that no contract for the erection of the building ever came into existence. I can only say with deference that, in my opinion, this is to take too narrow a view because it concentrates on but one fact, and ignores other facts which seem to me material, such as the grant of permission to erect buildings, which necessarily involved demolitions, the identification of the buildings by plans and the fact that the demolition was carried out as a work necessary for the erection of the building. The Master of the Rolls, in my humble opinion, has also taken too narrow a view of the words "works for the erection . . . of a "building" in holding that they do not in such cases as the present prima facie include works of demolition. As regards the other reason which influenced the Master of the Rolls, I have not found it necessary to consider in what circumstances permission may have been required for demolition works as such under the Act of 1932, for, as I have said, I agree with the opinions of

Lord Normand.

Jenkins and Morris L.JJ., who assumed that demolition works did not require a planning permission.

Mr. Lawrence argued that on the construction of section 78 (1) of the Act of 1947 adopted by the majority of the Court of Appeal strange results would follow, and he referred especially to the effect of such a construction upon the powers and duties of the planning authority under sections 21, 22, 26 and 30 of the Act. I am not satisfied that the results apprehended by Mr. Lawrence would follow; and in any case the words of section 78 (1) are themselves clear and they ought not to be wrested from their plain meaning because it is thought that anomalies may result.

On this first point, therefore, I am of opinion that Marks & Spencer Ld. succeed. But there is another point, which is equally vital to their success in defending the order pronounced by the Court of Appeal. They have manifestly failed to comply with the condition attached to the planning permission of August 9, 1938, and the London County Council therefore maintain that in terms of the condition their consent is null and void. Marks & Spencer Ld., however, maintain that the failure to fulfil the condition cannot have that effect because no reason for the condition was given in the permission of August 9, 1938, and they refer to section 10 (3) of the Act of 1932. It reads: "Where an application for permission to develop land is made to the specified "authority in manner provided by the Order" (the Town and Country Planning (General Interim Development) Order, 1933), "the authority may, subject to the terms of the Order, grant the "application unconditionally or subject to such conditions as they "think proper to impose, or may refuse the application, and they "shall be deemed to have granted the application unconditionally "unless within two months from the receipt thereof, or within "such longer period as the applicant may agree in writing to "allow, they give notice to him that they have decided to the "contrary, stating their reasons for so doing." The London County Council argue that "decided to the contrary" means "decided not to grant the application," and this is the construction put upon the words by Harman J. Marks & Spencer Ld. argue that the phrase means "decided not to grant the application unconditionally." The Court of Appeal has unanimously adopted this construction, and I most respectfully agree with their conclusion and with their reasons. I think that as a matter of language no other view is tenable. The failure to give a reason for the condition brings about a statutory deeming that the application for the planning permission was granted unconditionally, Marks & Spencer Ld. succeed on this point also.

I would therefore dismiss the appeal with costs.

Lord Reid. My Lords, I am asked by my noble and learned friends, Lord Oaksey and Lord Morton of Henryton, who are unable to be present this morning, to say that they concur in the motion proposed. My Lords, I also concur.

Lord Cohen. My Lords, I also concur.

Appeal dismissed.

Solicitors: *J. G. Barr; J. C. Parry; Treasury Solicitor.*

[HOUSE OF LORDS.]

THOMAS . . . . APPELLANT;
AND
MARSHALL (INSPECTOR OF TAXES) . . RESPONDENT.

H. L. (E.)*
1953
Mar. 2, 3;
Apr. 20.

Revenue—Income tax—Infant's savings bank account—Gift by father—"Settlement"—Interest as income of settlor—Finance Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 34), *s.* 21.

Absolute gifts by a father to his infant and unmarried children in the form of money paid into Post Office Savings Bank accounts opened in their names and of 3 per cent. Defence Bond holdings are "settlements" within section 21 of the Finance Act, 1936, and render the father liable as settlor to pay income tax under Sch. D on the interest payable on the accounts and the bonds.

Hood-Barrs v. *Inland Revenue Commissioners* [1947] W.N. 12; 176 L.T. 283; [1946] 2 All E.R. 768; 27 T.C. 385 approved.

Decision of the Court of Appeal [1952] 1 T.L.R. 1419; [1952] 2 All E.R. 32 affirmed.

Appeal from the Court of Appeal (Evershed M.R., Birkett and Romer L.JJ.).

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* *Present*: Lord Normand, Lord Oaksey, Lord Morton of Henryton, Lord Reid and Lord Cohen.

This was an appeal from an order of the Court of Appeal dated May 13, 1952, dismissing an appeal by the appellant, David Cardigan Thomas, from an order of Donovan J. dated January 18, 1952, dismissing an appeal by the appellant by way of case stated from a decision of the Commissioners for the General Purposes of the Income Tax for the Division of the Tower of London given on January 19, 1951, on the hearing of an appeal by the appellant against assessments made on him under Case III of Sch. D of the Income Tax Act, 1918, in the sums appearing in the case for the chargeable accounting periods for the years 1942–50 inclusive.

The question was whether certain gifts, being absolute gifts made by the appellant to his two infant children, Michael and Heather, constituted a settlement or series of settlements within the meaning of section 21 of the Finance Act, 1936.

The relevant facts, fully set out in the case stated, were summarized by Lord Morton of Henryton as follows:—On December 20, 1933, a Post Office Savings Bank account was opened by or on behalf of the appellant in the name of Michael (born September 8, 1933) with a deposit of £50, and on May 28, 1936, another Post Office Savings Bank account was opened by or on behalf of the appellant in the name of Heather (born February 1, 1936) with a deposit of £50. Thereafter the appellant paid further sums into the same bank for each of his children. Various sums were drawn from the accounts from time to time and were expended for the children's benefit. On December 31, 1948, Michael's account was in credit £844 9s. 0d. and Heather's account was in credit £844 8s. 3d. In the year 1945 the appellant bought £1,000 3 per cent. Defence Bonds for each of the two children. All the sums paid into the children's bank accounts, and the said Defence Bonds, were absolute and unconditional gifts made by the appellant to his children.

The Inspector of Taxes treated the interest upon the two Savings Bank accounts, exclusive of interest upon interest, and the interest upon the two holdings of Defence Bonds as being income of the settlor for the purposes of the Income Tax Acts. This he did in reliance upon the terms of section 21 of the Finance Act, 1936, which provide: "(1) Where, by virtue or in "consequence of any settlement to which this section applies "and during the life of the settlor, any income is paid to or for "the benefit of a child of the settlor in any year of assessment, "the income shall, if at the commencement of that year the child "was an infant and unmarried, be treated for all the purposes of "the Income Tax Acts, as the income of the settlor for that year "and not as the income of any other person. . . . (9) In this "section— . . . (b) the expression 'settlement' includes any dis- "position, trust, covenant, agreement, arrangement or transfer "of assets; (c) the expression 'settlor,' in relation to a settlement, "includes any person by whom the settlement was made or "entered into directly or indirectly. . . ."

Sir Andrew Clark Q.C. and *Charles Lawson* for the appellant. The relevant cases are *Hood-Barrs* v. *Inland Revenue Commissioners*[1]; *Chamberlain* v. *Inland Revenue Commissioners*[2]; *Inland Revenue Commissioners* v. *Morton*[3]; *Vestey's Executors* v. *Inland Revenue Commissioners*[4] (which was not cited in *Yates* v. *Starkey*[5]) and *St. Aubyn* v. *Attorney-General.*[6] In *Vestey's Executors* v. *Inland Revenue Commissioners*[7] the House of Lords approved Lord Macmillan's observations in *Chamberlain* v. *Inland Revenue Commissioners*,[8] adopting Lord Moncrieff's judgment in *Morton* v. *Inland Revenue Commissioners.*[9] *Hood-Barrs* v. *Inland Revenue Commissioners*,[10] and *Yates* v. *Starkey*,[11] which followed it, were wrongly decided and should be overruled. See also *Copeman* v. *Coleman.*[12]

On the construction of section 21 of the Finance Act, 1936, see also section 20 of the Finance Act, 1922 (referred to in section 21 (5) of the Act of 1936), section 20 (1) (b) and (5), section 38 (2) and section 41 (4) (b) of the Finance Act, 1938, defining "settlement." Whatever "settlement" means in the Act of 1938, it means the same thing in the Act of 1936. "Settlement" is defined in section 21 (9) (b) of the Act of 1936, and that definition is crucial. This definition is identical with that in section 41 (4) (b) of the Act of 1938, save for the addition of the phrase "transfer "of assets," which is otiose and adds nothing to the definition. Every gift is in the ordinary sense a disposition and also a transfer of assets (e.g., half-a-crown given to a nephew at school). There is nothing in section 21 of the Act of 1936 to require that every

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[1] 176 L.T. 283; [1946] 2 All E.R. 768; 27 T.C. 385.

[2] 59 T.L.R. 343; [1943] 2 All E.R. 200; 25 T.C. 317.

[3] 1941 S.C. 467; 24 T.C. 259.

[4] [1949] 1 All E.R. 1108; 31 T.C. 1.

[5] [1951] Ch. 465; [1951] 1 T.L.R. 661; [1951] 1 All E.R. 732.

[6] [1952] A.C. 15, 32, 43; [1951] 2 All E.R. 473.

[7] [1949] 1 All E.R. 1108, 1113, 1118, 1132–3, 1143; 31 T.C. 1, 81, 87–8, 107, 120.

[8] (1943) 59 T.L.R. 343, 346; 25 T.C. 317, 331.

[9] 1941 S.C. 467, 480; 24 T.C. 259.

[10] 176 L.T. 283; 27 T.C. 385.

[11] [1951] Ch. 465.

[12] [1939] 2 K.B. 484; [1939] 3 All E.R. 224.

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disposition must be treated as being a settlement. There are many dispositions which would not be settlements, and the facts of each case must be looked at in the light of the section. Despite the definition the word "settlement" still remains the dominant word in section 21 (1), which is the charging part of the section. To bring a case within the Act one must find something in the nature of a settlement, and the term "settlement" can apply only to cases where the legal title to property is separated from the beneficial interest, or where there has been a separation of the beneficial interest in the income from the beneficial interest in the capital producing it. It would be a ludicrous result if when a father gave his schoolboy son £1, which the boy put into the Post Office Savings Bank, that amounted to a settlement within the meaning of the section.

Section 47 of the Bankruptcy Act, 1883, throws light on the meaning of the word "settlement," and the authorities under it indicate that a gift of cash could not in any event be a settlement. The cases under the section are also relevant to the meaning of the term "transfer of assets": see *In re Vansittart*[13]; *In re Player*[14]; *In re Plummer*[15]; *In re Tankard.*[16]

In the construction of taxing Acts one must give the words their ordinary everyday meaning and not construe them widely so as to give them a meaning which no ordinary person would think of. To adopt the Crown's construction in this case would be to stretch the plain meaning of the word "settlement" in order to comply with what is alleged to be the intention of the legislature, contrary to the principles laid down in *St. Aubyn* v. *Attorney-General.*[17]

It is admitted that if these gifts were settlements the appellant was the settlor.

The submissions for the appellant are as follows: (1) In section 21 of the Act of 1936 subsection (1) is the charging subsection, and in it the only word used is "settlement." From that it follows that "settlement" is the dominant word: see *Morton* v. *Inland Revenue Commissioners*[18]; *Chamberlain* v. *Inland Revenue Commissioners*[19] and *Vestey's Executors* v. *Inland Revenue Commissioners.*[20]

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[13] [1893] 1 Q.B. 181, 184; 9 T.L.R. 14.

[14] (1885) 15 Q.B.D. 682, 687.

[15] [1900] 2 Q.B. 790, 804.

[16] [1899] 2 Q.B. 57, 58; 15 T.L.R. 332.

[17] [1952] A.C. 15, 30.

[18] 1941 S.C. 467, 480; 24 T.C. 259, 269.

[19] 59 T.L.R. 343, 346; 25 T.C. 317, 331.

[20] [1949] 1 All E.R. 1108, 1119; 31 T.C. 1, 88.

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(2) Section 21 (9) of the Act of 1936 is not a definition section: see *per* Lord Moncrieff in *Morton* v. *Inland Revenue Commissioners.*[21] It does not purport to change the meaning of "settlement" but merely enlarges it by saying that it shall include certain transactions. That, being only an enlargement, cannot destroy the meaning of the word "settlement." For a settlement to come within the section one must find one which can include a transfer of assets, etc.

(3) It follows that before the section can apply at all one must find some transaction which is in the nature of a settlement in its broadest possible sense. The broadest possible sense in which the word could be used without destroying its meaning is a transfer of assets with some restraints on alienation. These restraints must be legal "strings" attached such as would subject the transferee to some action at law or in equity if he attempted to alienate the subject-matter.

(4) One must find not only something in the nature of a settlement, but also something in the nature of the type of settlement contemplated by section 21 (1). An absolute and unconditional gift cannot be a settlement within the contemplation of section 21. It would make nonsense of the section to class such a gift as being in the nature of a settlement. The words "for the benefit" in subsection (1) only have application where the payment is to some person other than the child, and so they cannot apply here.

(5) In the case of an absolute gift, even an income-producing asset, the income is never paid to the donee "by virtue or in "consequence of" the gift. If the donee is given cash and he invests it, the income is not paid to him "by virtue" of the gift but by virtue of his having invested it. (There is no distinction between "by virtue" and "in consequence.") If what is given is an income-producing asset, like shares, the subsequent income is paid to the donee by virtue of his election to keep the shares and not to sell them—"by virtue or in consequence," not of the gift, but of his retention of the shares. So a gift with no "strings" impeding alienation is not a settlement. In the case of a gift of a chattel which is subsequently sold, e.g., jewellery or a motor-car given to a daughter, who sells it and invests the proceeds, it cannot be said that the income from the invested proceeds is payable by virtue of the gift. If an absolute gift were held to fall within section 21, it would be hard to determine in

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[21] 1941 S.C. 467, 480; 24 T.C. 259, 268.

such a case whether the income was paid to the child "by virtue "or in consequence of" the gift. One is not presupposing trickery but ordinary natural cases. If gifts were to be treated as settlements there is nothing in section 21 to limit them to income bearing assets. This is a case of an absolute and unconditional gift and so subsection (2) of section 21 does not apply at all. A gift, if it is to be a settlement, must be an irrevocable settlement. It would be destructive of thrift if the effect of this section were to encourage the spending of gifts to children at once. The section was never designed to touch any such gift as this. An absolute and unconditional gift is the very antithesis of a "settlement" in any possible sense in which that word could be used either by a lawyer, a business man or the man in the street. It would be wrong and contrary to the opinion of the majority in *St. Aubyn* v. *Attorney-General* [22] to construe the word as something which is its antithesis.

(6) If it had been the legislature's intention that section 21 should apply to absolute and unconditional gifts it would have been simple and natural to include in the charging part of the section the words "or by virtue or in consequence of any absolute "and unconditional gift." Since such a gift is so different from a settlement, that would have been done if it had been intended. On the Crown's construction the wording of section 21 is tautologous.

(7) Some weight must be given to the difference between "disposition" in section 22 (1) of the Finance Act, 1922, and "settlement" in section 21 (1) of the Act of 1936: see *Hood-Barrs* v. *Inland Revenue Commissioners*.[23]

(8) The bankruptcy cases provide a valuable analogy, showing that where there is an expansion clause such as subsection (9) of section 21 of the Act of 1936, it does not mean that every transfer of assets, including a transfer of assets without any "strings," comes within the meaning of the term "settlement" in the operative part of the Act. Before a transfer of assets can partake of the nature of a settlement there must be a factor falling within one of the following heads: (1) some restraint on alienation of the gift; (2) a separation of the legal title from the beneficial interest in the subject of the gift, so that they are conferred on different persons; (3) a severance of the right to receive the income from the ownership of the capital of the subject of the gift, so that they are given to different persons. In any of these cases, and

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[22] [1952] A.C. 15.

[23] 176 L.T. 283, 285; 27 T.C. 385, 392.

possibly in others, a transfer of assets would be in the nature of a settlement.

The appellant particularly relies on the observations in *Inland Revenue Commissioners* v. *Morton*[24]; *Chamberlain* v. *Inland Revenue Commissioners*[25] and *Vestey's Executors* v. *Inland Revenue Commissioners*,[26] cases decided under section 38 (2) of the Finance Act, 1938.

[LORD NORMAND intimated that their Lordships did not require to hear any argument on behalf of the respondent on the question whether the cases decided under section 38 (2) of the Act of 1938 illuminated section 21 of the Act of 1936, but they wished to hear argument on the construction of section 21 on its own merits and on the effect of the bankruptcy cases.]

Sir Reginald Manningham-Buller S.-G., *Pennycuick Q.C.*, *J. H. Stamp* and *Sir Reginald Hills* for the Crown. The income arising from the bank deposits and Defence Bonds belonging to the children was rightly included in the appellant's income for the purpose of the assessments made on him in respect of income chargeable under Case III of Sch. D of the Income Tax Act, 1918. The provisions of section 21 of the Act of 1936 required that the income of his infant children so arising should be treated as his income and not as income of either of the children.

It was said on behalf of the appellant that the question arising on this appeal is whether an absolute and unconditional gift is a settlement within the meaning of section 21. But the question is not thus properly posed. Properly stated it is: is an absolute and unconditional gift of shares in cash a producer of income within section 21? For the appellant it was also argued that before one can apply the section one must find something in the nature of a settlement in the ordinary sense. That is ill-founded in relation to section 21, although it may be so in the case of section 38 of the Act of 1938. The effect of section 21, and its object, is to secure that any income paid for the benefit of the child of a settlor by virtue of a settlement as defined in the section is to be treated as income of the settlor, no matter in what manner the provision is made by him for the child. Clearly from the way in which section 21 (1) is drafted, it applies to any transaction or arrangement, and any such transaction or arrangement which produces income is caught.

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[24] 1941 S.C. 467, 475–6, 480–1, 483; 24 T.C. 259, 265–6, 269, 271.

[25] 59 T.L.R. 343, 345, 347; 25 T.C. 317, 330, 331–2, 335.

[26] [1949] 1 All E.R. 1108, 1113–4, 1118–9, 1132, 1133, 1143; 31 T.C. 1, 82, 88, 107, 108, 120.

The definition of "settlement" in section 1 of the Settled Land Act, 1925, indicates the normal meaning of the word. In the definition in section 21 (9) (*b*) of the Act of 1936 full effect must be given to the words used, in particular the words "includes "any." The word "settlement" is thereby given an enlarged meaning, but the appellant seeks to place an ill-defined limitation on that enlargement, thereby amending the expressions of the statute. The Army Act, s. 190 (40), says that "the expression "'horse' includes a mule"; it could not be argued that the only mules included were those having the characteristics of horses. Under the section the proper questions to be asked are: (a) Was there a transfer of assets? (b) In consequence of the transfer, was income payable to the child?

The Crown's interpretation of the section is not tautologous: see *Hill* v. *William Hill* (*Park Lane*) *Ld.*[27] The court must seek to give effect to the expressions "transfer of assets" and "disposition." The words "transfer of assets" are deliberately put into the section to indicate its scope. Subsection (9) (*b*) should not be treated as having read into it the words "in the "nature of a settlement." Its words have their ordinary and natural meaning. In the phrase "by virtue or in consequence of "any settlement" in subsection (1) the words "by virtue" are not the same as "in consequence"; the latter are wider. Here the income arose to the children "by virtue of" the transfer of assets and also "in consequence of" it. For the appellant it was contended that if shares were transferred to an infant the income from them was received "in consequence of" his decision not to dispose of that asset. This contention is not well-founded. Where shares are transferred and the income is subsequently received, clearly it is received both "in consequence of" the transfer and "by virtue of" it. Where cash is transferred to an infant and invested by him it may be hard to determine whether or not the income is received "in consequence of" the transfer. But in the present case it is clear that what was transferred produced income for the benefit of the children.

The present point was not raised in *Copeman* v. *Coleman*,[28] where the question was not whether the transaction was in the nature of a settlement, but whether it was bona fide. The decision tends to support the Crown's contention. *Hood-Barrs* v.

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[27] [1949] A.C. 530, 546, 547; 65 T.L.R. 471, 474, 475; [1949] 2 All E.R. 452, 461.

[28] [1939] 2 K.B. 484, 494.

Inland Revenue Commissioners,[29] followed in *Yates* v. *Starkey*,[30] is authority for the Crown's argument. *Inland Revenue Commissioners* v. *Payne* [31] is referred to with approval in *Morton* v. *Inland Revenue Commissioners*.[32]

As to the bankruptcy cases, the application of section 47 of the Bankruptcy Act, 1883, does not throw any useful light on the interpretation of section 21 of the Act of 1936. If any assistance can be found in the section, it is in favour of the Crown's contention. The words "transfer of property" (section 47 (3) of the Act of 1883) and "transfer of assets" (section 21 (9) (*b*) of the Act of 1936) mean the same thing in whichever definition clause they are included. In the Act of 1883 the definition of "property" is in another section (section 168). The purpose, object and intent of the Act of 1883 are so different from those of the present Act that it is wiser not to place reliance on it. It does not indicate that an absolute gift is not caught by section 21 of the Act of 1936. *In re Vansittart* [33] establishes that an absolute gift can be a settlement.

Pennycuick Q.C. following. In the cases under the Bankruptcy Act, 1883, the courts held with one qualification that outright gifts were settlements within the extended definition of section 47 (3): see especially *In re Vansittart*.[33] For the qualification see *In re Plummer*,[34] *per* Lord Alverstone M.R.: ". . . "if there is a gift of money or proceeds, but it is not intended that "the money or the proceeds shall be retained by the donee in the "form of money, but shall be expended at once, that will not "be a 'settlement.'" The effect of the bankruptcy cases is that in the case of an outright gift where it is contemplated that the subject-matter shall be retained indefinitely the section shall apply. The reason for the qualification lies in the context of the operative provisions of the Act.

Sir Andrew Clark Q.C. in reply. On the argument for the Crown one would wholly disregard the use of the word "settle-"ment" in section 21 (1) of the Act of 1936 and read the definition in subsection (9) as though it stood alone and apart. That is wrong, for its words cannot be divorced from their context, and some effect must be given to the use of the word "settlement." But, even if the Crown be right in that, it must still surmount the next step and show that, assuming that the word settlement can in effect be struck out of the charging subsection, an absolute and unconditional gift is the type of "transfer "of assets" aimed at by it. Some permanency is visualized by it, so that the income shall be paid or applied for the benefit of the child over a period of time, but once a gift is absolute there is no such element of permanency. The section is entirely aimed at income, not capital. On its construction no absolute gift can come within it, for it is not designed to strike at that sort of thing. Payments to be made irrevocably during the life of a child would not come within the section unless the provisions in the deed respecting them were in the nature of a settlement, and one would have to examine the terms of the deed to see whether or not that was so.

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[29] 176 L.T. 283, 287; 27 T.C. 385, 395.

[30] [1951] Ch. 465.

[31] (1940) 23 T.C. 610, 620.

[32] 1941 S.C. 467, 480; 24 T.C. 259, 269.

[33] [1893] 1 Q.B. 181.

[34] [1900] 2 Q.B. 790, 804.

As to the example cited from the Army Act, it exemplifies the appellant's contention, since a mule is an animal in the nature of a horse because one of its parents is a horse. Say a statute defined "cattle" as "all animals normally found on a farm"; on the Crown's contention that would include mice and rats, but on the appellant's contention it would include animals normally used for the purposes of the farm.

If a gift of £5,000 to an infant were invested in a smallholding it would be impossible to say how much of the income arose by virtue of the gift and how much by virtue of his work and ingenuity.

Prima facie, an outright gift is not within the section, for "the transaction must be in the nature of a settlement, though "it may be effected by a conveyance or transfer": see *In re Player*.[35]

Their Lordships took time for consideration.

April 20. LORD NORMAND. My Lords, I have had the advantage of reading the opinion about to be delivered by my noble and learned friend, Lord Morton of Henryton, and I agree with him that this appeal must be dismissed for the reasons given by him. He has quoted and commented upon certain observations made by me in *St. Aubyn* v. *Attorney-General*.[1] I must confess that I there used language of a breadth which lends itself to misunderstanding and that I ought to have expressly qualified my words in the manner which my noble and learned friend indicates.

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[35] 15 Q.B.D. 682, 686, 687.

[1] [1952] A.C. 15; [1951] 2 All E.R. 473.

Lord Morton of Henryton. My Lords, my noble and learned friend, Lord Oaksey, has asked me to say that he concurs in the opinion which I am about to deliver.

My Lords, the question which arises on this appeal is whether interest upon two Post Office Savings Bank accounts, one in the name of the appellant's son Michael, and the other in the name of the appellant's daughter Heather, and interest upon two holdings of £1,000 3 per cent. Defence Bonds in the names of Michael and Heather respectively, ought to be treated, for all the purposes of the Income Tax Acts, as the income of the appellant.

The relevant facts are fully set out in the case stated and may be summarized as follows:—On December 20, 1933, a Post Office Savings Bank account was opened by or on behalf of the appellant in the name of Michael (born September 8, 1933) with a deposit of £50, and on May 28, 1936, another Post Office Savings Bank account was opened by or on behalf of the appellant in the name of Heather (born February 1, 1936) with a deposit of £50. Thereafter the appellant paid further sums into the same bank for each of his children. Various sums were drawn from the accounts from time to time and were expended for the children's benefit. On December 31, 1948, Michael's account was in credit £844 9s. 0d. and Heather's account was in credit £844 8s. 3d. In the year 1945 the appellant bought £1,000 3 per cent. Defence Bonds for each of the two children. All the sums paid into the children's bank accounts, and the said Defence Bonds, were absolute and unconditional gifts made by the appellant to his children.

The Inspector of Taxes treated the interest upon the two Savings Bank accounts, exclusive of interest upon interest, and the interest upon the two holdings of Defence Bonds as being income of the settlor for the purposes of the Income Tax Acts. This he did in reliance upon the terms of section 21 of the Finance Act, 1936. That section provides as follows: "(1) Where, "by virtue or in consequence of any settlement to which this "section applies and during the life of the settlor, any income "is paid to or for the benefit of a child of the settlor in any year "of assessment, the income shall, if at the commencement of "that year the child was an infant and unmarried, be treated "for all the purposes of the Income Tax Acts as the income of "the settlor for that year and not as the income of any other "person. . . . (9) In this section— . . . (*b*) the expression "'settlement' includes any disposition, trust, covenant, agree-"ment, arrangement or transfer of assets; (c) the expression "'settlor,' in relation to a settlement, includes any person by "whom the settlement was made or entered into directly or "indirectly. . . ."

Counsel for the appellant sought to rely upon certain other subsections in the course of his argument, but I think it is unnecessary to set them out, as I understand that all your Lordships are of opinion that they throw no light upon the question which arises for decision.

For the sake of simplicity, I shall consider only the gifts to Michael, as the gifts to Heather stand on precisely the same footing.

Counsel for the appellant does not seek to draw any distinction between the interest on the bank account in Michael's name and the interest on the Defence Bonds bought in Michael's name, and it is common ground that if the gifts of money and Defence Bonds were "settlements" within the meaning of section 21 of the Finance Act, 1936, the appellant was the settlor. It is also common ground that income was paid to Michael by virtue or in consequence of these gifts. Thus the only point for determination is—Were the absolute gifts in question "settlements" within the meaning of section 21 of the Finance Act, 1936? This question has been answered in the affirmative successively by the Commissioners, by Donovan J. and by the Court of Appeal.

My Lords, I too would answer this question in the affirmative. It is true that an absolute gift of money or of an investment would not ordinarily be described as a "settlement," but it is expressly enacted that in section 21 the expression "settlement" includes, inter alia, "Any . . . transfer of assets." For my part, I see no escape from the conclusion that the appellant made a transfer of assets, in the ordinary meaning of that phrase, when he used his own money to make a payment into Michael's bank account and to purchase Defence Bonds in Michael's name. Sir Andrew Clark, for the appellant, invited your Lordships to put a limited and special meaning upon this phrase. I shall shortly examine his arguments, but it should be said at once that the matter is by no means free from authority.

In *Hood-Barrs* v. *Inland Revenue Commissioners*[2] the Court of Appeal had to decide whether a gift of shares by a father

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[2] 176 L.T. 283; [1946] 2 All E.R. 768; 27 T.C. 385.

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to each of his two infant and unmarried daughters was a "settlement" within section 21 of the Act of 1936. The court unanimously held that it was, because it was a "transfer of "assets," and declined to give that phrase a limited meaning. That decision is not, of course, binding upon your Lordships' House, but in my view it was correct and is indistinguishable from the present case. It is, I think, unnecessary to consider the decision in *Yates* v. *Starkey*[3] as the facts differed widely from the facts of the present case, but Jenkins L.J. observed[4]: "For their meaning"—i.e., for the meaning of the words "settlement" and "settlor" in section 21—". . . I must go "to the definitions provided by subsection (9), construe those "definitions, and apply them according to their true construction, "however remote from the ordinary conceptions of 'settlement' "or 'settlor' the content of the definitions may in any given "instance appear to be." This observation, with which I agree, is particularly relevant to the argument presented by Sir Andrew Clark in the present case.

Sir Andrew, while conceding that each of the gifts now in question might be described as a transfer of assets, if this phrase were to be given its ordinary meaning, contended that as the word "settlement" was the only word used in the charging subsection (1), it was "the dominant word"; and that a transaction did not come within section 21 unless it was "something "in the nature of a settlement." It follows, he said, that a transaction which might ordinarily be described as a transfer of assets did not come within section 21 unless (a) it was accompanied by some restraint on alienation, such as would subject the transferee to some action at law or in equity if he attempted to alienate the subject of the gift, or (b) the income and the capital of the subject of the gift were given to different persons, or (c) the legal title and the equitable interest in the subject of the gift were conferred on different persons. In any one of these three cases, he said, and it may be in other cases, a transfer of assets would be something in the nature of a settlement, but an absolute and unconditional gift is the antithesis of a settlement and cannot be a "transfer of assets" within the meaning of section 21.

My Lords, in the words used by Lord Greene M.R. in *Hood-Barrs* v. *Inland Revenue Commissioners*,[5] this is a

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[3] [1951] Ch. 465; [1951] 1 T.L.R. 661; [1951] 1 All E.R. 732.

[4] [1951] Ch. 465, 476.

[5] 176 L.T. 283, 292; 27 T.C. 385, 402.

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"subversive suggestion" as to the meaning and operation of such an interpretation clause as subsection (9) (*b*) and I cannot accept it. The object of the subsection is, surely, to make it plain that in section 21 the word "settlement" is to be enlarged to include other transactions which would not be regarded as "settlements" within the meaning which that word ordinarily bears. Its effect is that wherever the word "settlement" occurs in section 21 one must read it as "settlement, disposition, trust, "covenant, agreement, arrangement or transfer of assets," and if "by virtue or in consequence of" any of these transactions or deeds income is paid to or for the benefit of a child of the settlor, section 21 comes into operation.

I can find no context here which should lead your Lordships to give, for instance, the words "transfer of assets" any meaning other than that which they ordinarily bear, or to infuse into them some flavour of the meaning ordinarily given to the word "settlement." Further, Sir Andrew's contention, if it were accepted, would create grave uncertainty as to the precise content of each of the words used in subsection (9) (*b*). What, for instance, is a covenant "in the nature of a settlement"? And what is the difference between a "settlement," in the ordinary meaning of that word, and a trust "in the nature of a settle-"ment"? Sir Andrew submits that uncertainty also results if an absolute gift is held to fall within section 21, for it may be a matter of great difficulty to determine, in certain cases, whether income is paid to or for the benefit of a child of the settlor "by "virtue or in consequence of" such a gift. For example, said counsel, if a father gives his child a motor-car or jewellery, and the child sells the gift and invests the proceeds, is the income from the investment paid to the child "by virtue or in con-"sequence of" the gift, or is it paid to him or her in consequence of the sale of an asset which belonged absolutely to the child?

My Lords, I can find no force in this argument. It is true that difficulties may arise of the kind suggested by counsel. In each case it will be for the Commissioners to make a finding as to whether the income in question was or was not paid to or for the benefit of the child "by virtue or in consequence of" the settlement. These are not difficulties in construing the section but difficulties in applying it to the facts of particular cases. Their existence affords no reason for imparting uncertainty into the meaning of the words used in subsection (9) (*b*).

I must, however, refer to certain authorities relied on by Sir Andrew Clark as supporting his argument. He first referred to the cases of *Inland Revenue Commissioners* v. *Morton*,[6] *Chamberlain* v. *Inland Revenue Commissioners*,[7] and *Vestey's Executors* v. *Inland Revenue Commissioners*.[8] These were all decisions as to the effect of section 38 (2) of the Finance Act, 1938. That section provided that if and so long as the terms of any settlement answered a particular description, any income arising under the settlement "from the property comprised in "the settlement" should be treated as the income of the settlor, and the definition subsection—section 41 (4) (*b*)—is in substance the same as section 21 (9) (*b*) of the Act of 1936, except that the words "or transfer of assets" are omitted. Sir Andrew does not rely upon the decisions in these cases, but he does rely upon certain observations which appear in the judgments.

My Lords, I can derive no assistance from any of these observations. They were very fully analysed by Evershed M.R., in his judgment in the present case. I agree with that analysis and I need not repeat it. It is to be noted that the observations in question were not directed to the section now under consideration; further, in each of these cases it was unanimously held that there was a "settlement," within the meaning of sections 38 and 41 (4) (*b*) of the Act of 1938, and the attention of the Court of Session in *Morton's* case,[9] and of this House in the cases of *Chamberlain*[10] and *Vestey*,[11] was directed to determining what was "the property comprised in the settlement."

Sir Andrew next sought support from the case of *St. Aubyn* v. *Attorney-General*[12] and particularly from observations of Lord Simonds and Lord Normand as to the meaning of the words "Where a person dying after the commencement of this Act has "made to a company to which this section applies a transfer of "any property," in section 46 of the Finance Act, 1940. The majority of this House decided that in paying cash for 100,000 preference shares, for which he subscribed, the second Baron St. Levan did not "make a transfer of any property" to St. Aubyn Estates Ld. within the meaning of section 46.

Lord Simonds said[13]: "The first point arises on the sub-"scription by Lord St. Levan for 100,000 preference shares. "For these he paid cash according to the ordinary use of "language. Did he then 'transfer property' to the company

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[6] 1941 S.C. 467; 24 T.C. 259.

[7] 59 T.L.R. 343; [1943] 2 All E.R. 200; 25 T.C. 317.

[8] [1949] 1 All E.R. 1108; 31 T.C. 1.

[9] 1941 S.C. 467; 24 T.C. 259.

[10] 59 T.L.R. 343; 25 T.C. 317.

[11] [1949] W.N. 233; 31 T.C. 1.

[12] [1952] A.C. 15.

[13] Ibid. 32.

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" within the meaning of section 46? My Lords, I have no " hesitation in saying that the payment of cash to a company " upon a subscription for shares is not a transfer of property " to the company. No one, lawyer, business man or man in the " street, was ever heard to use such language to describe such " an act and I decline to stretch the plain meaning of words " in an Act of Parliament in order to comply with what is said " to be its purpose. . . . The question is not at what transaction the section is, according to some alleged general purpose, " aimed but what transaction its language, according to its " natural meaning, fairly and squarely hits. Applying this, the " one and only proper test, I say that when Lord St. Levan " paid for his shares he did not transfer property to the " company."

Lord Normand said [14]: " The first point is whether Lord St. " Levan, when he paid £100,000 for the preference shares in the " company, made a transfer of property within the meaning of " section 46. My opinion is that ' transfer of property ' are not " the usual words which would be naturally selected to describe " a payment of money, though it cannot be denied that money is " property or that payment is a transfer. I think that if it " had been intended to strike at money payments the simple " words necessary to make that intention clear would have been " added."

The observations of Lord Simonds were clearly directed only to the section then under consideration and to the meaning of the words " transfer of any property " in the context wherein they then appeared. In my view they do not assist the appellant in the present case. On the contrary, I think that the transaction in the present case is one which the phrase " transfer " of assets " in the section now under consideration " fairly and " squarely hits." It is no doubt possible to read Lord Normand's observations as referring generally to the meaning of the phrase " transfer of property," but I feel sure that my noble and learned friend intended to deal only with the meaning and effect of the words " transfer of property " in section 46 of the Finance Act, 1940, and to concur with the view of Lord Simonds that Lord St. Levan, in paying cash for preference shares, did not transfer property to the company within the meaning of the section.

Finally, Sir Andrew referred to a series of decisions upon the meaning of the word "settlement" in section 47 of the Bankruptcy Act, 1883. That section provides as follows: "(1) Any "settlement of property not being a settlement made before "and in consideration of marriage, or made in favour of a "purchaser or incumbrancer in good faith and for valuable con"sideration, or a settlement made on or for the wife or children "of the settlor of property which has accrued to the settlor "after marriage in right of his wife, shall, if the settlor becomes "bankrupt within two years after the date of the settlement, "be void against the trustee in the bankruptcy, and shall, if "the settlor becomes bankrupt at any subsequent time within "10 years after the date of the settlement, be void against the "trustee in the bankruptcy, unless the parties claiming under the "settlement can prove that the settlor was at the time of making "the settlement able to pay all his debts without the aid of "the property comprised in the settlement, and that the interest "of the settlor in such property had passed to the trustee of "such settlement on the execution thereof. . . . (3) 'Settlement' "shall for the purposes of this section include any conveyance "or transfer of property." Section 168 (1) provides: "In this "Act, unless the context otherwise requires . . . 'Property' "includes money, goods, things in action, land, and every des"cription of property, whether real or personal and whether "situate in England or elsewhere; also, obligations, easements, "and every description of estate, interest and profit, present or "future, vested or contingent, arising out of or incident to "property as above defined. . . ."

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[14] [1952] A.C. 43.

In *In re Player* [15] it was held by a Divisional Court (Mathew, Cave and Wills JJ.) that a gift of £650 made by the bankrupt to his son, in order to pay for the stock in trade necessary to enable the son to commence a business, was not a "settlement" within section 47. Cave J. after setting out the history of the earlier statutes dealing with this matter, said [16]: "It is contended that "by virtue of the interpretation clause in the Act of 1883, when "applied to section 47, every gift by a father to children, if "followed within two years by the father's bankruptcy, is within "that section, and that a son can be compelled to refund all "moneys given to him within that period for his maintenance "or advancement in life. It seems to me a very strong thing "to say that a definition of 'property' not to be found in the

[15] 15 Q.B.D. 682.

[16] Ibid. 686, 687.

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"section itself which deals with this matter, but found in the "interpretation clause applying to the whole Act, should have "an effect going so much further than the legislature has gone "before. I do not think it was intended that section 47 should "have that effect. One must look at the whole of the language "of the section in applying that definition, and consider what "is meant by 'settlement.' Although 'settlement,' by sub-"section (3) 'shall for the purposes of this section include any "'conveyance or transfer of property,' yet I think the view of "my brother Mathew is well founded, and that a settlement "in the ordinary sense of the word is intended. The transaction "must be in the nature of a settlement, though it may be effected "by a conveyance or transfer. The end and purpose of the thing "must be a settlement, that is, a disposition of property to be "held for the enjoyment of some other person. Thus a purchase "by the father of shares, which are registered in the son's name, "and upon which the son receives the dividends, is within the "statute. But where the gift is of money to be expended at "once, the transaction is not, in my opinion, within section 47 "of the Act of 1883. It would not have been within the Act of "1849, and I do not feel bound by reason of the interpretation "clause in the Act of 1883, the effect of which is, I think, "restricted by the terms of section 47 itself, to put a construction "upon the words of that section which has never been put upon "similar words before the Act of 1883 was passed, and which "would bring about such serious and far-reaching consequences."

In *In re Vansittart*[17] Vaughan Williams J. adopted the reasoning just quoted, and held that a gift of jewellery by the bankrupt to his wife within two years of his bankruptcy was a "settlement" within section 47 and therefore void against the trustee in the bankruptcy, because[18] "the 'donor' contemplated "the retention by his wife of the present which he gave her." In *In re Tankard*[19] Wright J. followed the two cases just cited, and in *In re Plummer*[20] the Court of Appeal approved of all three cases. In the last-mentioned case Lord Alverstone M.R. observed[21]: "There are two lines of cases bearing upon the "subject, which I will indicate as follows. If there is a gift by "a father to a son of money or proceeds of property which can

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[17] [1893] 1 Q.B. 181; 9 T.L.R. 14.

[18] [1893] 1 Q.B. 181, 184.

[19] [1899] 2 Q.B. 57; 15 T.L.R. 332.

[20] [1900] 2 Q.B. 790.

[21] Ibid. 804.

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"be traced, and the money or proceeds is or are intended to be "retained or preserved as the property of the donee, that money "or those proceeds will be property in 'settlement.' On the "other hand, if there is a gift of money or proceeds, but it is "not intended that the money or the proceeds shall be retained "by the donee in the form of money, but shall be expended at "once, that will not be a 'settlement.'"

My Lords, I give full weight to the fact that in section 47 of the Bankruptcy Act, 1883, the legislature first used the word "settlement" and then defined it, in the same section, as including any transfer of property, and I would not seek to draw any distinction between the phrase "transfer of property" and the phrase "transfer of assets" which occurs in section 21 (9) of the Finance Act, 1936. To this extent, the two sections resemble one another, and Sir Andrew Clark relies strongly upon the observation of Cave J. in *In re Player* [22] that to come within section 47 "the transaction must be in the nature of a settlement, though it may be effected by a conveyance or transfer." I am content to assume in favour of the appellant that the four cases on section 47 just cited were all rightly decided, and that the observation just quoted puts a correct construction on section 47. In my opinion, however, these cases do not help the appellant. In none of them was it doubted that an absolute gift could be a "settlement" within section 47, and in two of them such a gift was held to be a settlement. The court, however, felt able to put some restriction upon the ordinary meaning of the words "transfer of property" by reason of the fact that the whole object of the section, as appeared from its terms, was to make certain transactions void as against the trustee in bankruptcy; and it was thought that a transfer of money, which was to be at once expended and could not be traced, was not within the intendment of the section. I can find no words in section 21 of the Finance Act, 1936, which should lead your Lordships to put a limited meaning upon the words "transfer of assets," and if and so far as one can gather the intendment of section 21 from its wording, I think it was intended to throw the net as widely as possible, and to sweep in all kinds of transactions which would not ordinarily be regarded as settlements, provided only that "by virtue or in consequence" thereof any income is paid to or for the benefit of a child of the settlor.

In my judgment the argument for the appellant receives no

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[22] 15 Q.B.D. 682, 687.

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countenance from the wording of section 21 or from any of the authorities relied upon by counsel. I would dismiss the appeal with costs.

LORD REID. My Lords, I concur.

LORD COHEN. My Lords, I also concur.

Appeal dismissed.

Solicitors: *Tyrrell Lewis & Co.; Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

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Apr. 14, 15;
June 25.

PRESTON AND AREA RENT TRIBUNAL . APPELLANT;

AND

PICKAVANCE . . . . RESPONDENT.

Landlord and Tenant—Rent tribunal—Security of tenure—Notice to quit given by landlord more than three months after decision of tribunal—Jurisdiction of tribunal to grant or extend security of tenure—Furnished Houses (Rent Control) Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 34), *s.* 5*—Landlord and Tenant (Rent Control) Act,* 1949 (12 *&* 13 *Geo.* 6, *c.* 40), *s.* 11 (1).

By section 5 of the Furnished Houses (Rent Control) Act, 1946: "If, after a contract to which this Act applies has been referred "to a tribunal . . . a notice to quit the premises to which the "contract relates is served by the lessor on the lessee at any time "before the decision of the tribunal is given or within three months "thereafter, the notice shall not take effect before the expiration of "the said three months."

By section 11 (1) of the Landlord and Tenant (Rent Control) Act, 1949: "Where a contract to which the Act of 1946 applies has "been referred to a tribunal under that Act, and the reference has "not been withdrawn, the lessee may, at any time when a notice "to quit has been served and the period at the end of which the "notice takes effect (whether by virtue of the contract, of the Act "of 1946 or of this section) has not expired, apply to the tribunal "for the extension of that period." By subsection (5): "This "section shall be construed as one with the Act of 1946. . . ."

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* *Present*: LORD PORTER, LORD OAKSEY, LORD REID, LORD TUCKER and LORD ASQUITH OF BISHOPSTONE.

The tenant of a furnished dwelling-house referred his contract of tenancy to a rent tribunal, which approved the rent and made no order as to security of tenure, and he remained in possession thereafter under his contract of tenancy. The landlord served a notice to quit more than three months after the decision of the tribunal had been given:—

Held, that section 11 of the Act of 1949 is not subordinate to section 5 of the Act of 1946 and empowers the rent tribunal to grant an extension or successive extensions of the tenancy beyond the period of three months from the date of its decision, provided for in section 5, although no notice to quit may have been served before the end of that period.

Decision of the Court of Appeal (sub nom. *Reg.* v. *St. Helens and Area Rent Tribunal; Ex parte Pickavance*) [1952] 2 Q.B. 370; [1952] 1 T.L.R. 1494; [1952] 2 All E.R. 9 reversed.

APPEAL from the Court of Appeal (Somervell and Morris L.JJ., Jenkins L.J. dissenting).

This was an appeal from an order of the Court of Appeal, affirming an order of the King's Bench Division (Lord Goddard C.J., Jones and Parker JJ.), whereby it was ordered that the directions of the Rent Tribunal for St. Helens and Area, sitting at St. Helens, in the County of Lancaster, on September 7, 1951, and October 16, 1951, that a notice to quit served on William John Leyland by Ethel Pickavance should not have effect eventually until December 11, 1951, be removed into the High Court of Justice, King's Bench Division, and thereupon be quashed. On December 5, 1952, it was ordered that the proceedings be continued in the name of the Preston and Area Rent Tribunal.

Paragraphs 3 to 5 of the respondent's printed case on appeal to the House of Lords were as follows:—

"3. The facts giving rise to the present appeal, which are "not in dispute, are, so far as material to be herein stated, as "follows: (a) Ethel Pickavance is the owner of a dwelling-house "situate at and known as 51 Rodney Street, St. Helens, in the "County of Lancaster. On or about August 1, 1948, Ethel "Pickavance by a contract let 51 Rodney Street furnished to "William John Leyland on a weekly tenancy at a rent of £1 per "week. (b) On August 1, 1950, William John Leyland referred "that contract to the St. Helens and Area Rent Tribunal under "the provisions of section 2 of the Furnished Houses (Rent Control) Act, 1946. The tribunal heard the parties and gave their "decision on September 8, 1950. They approved the aforesaid "rent. They did not reduce the statutory period of three months "after their decision during which by virtue of section 5 of the "Furnished Houses (Rent Control) Act, 1946, a notice to quit ". . . would not take effect. (c) On December 9, 1950, that is "to say three months and one day after the decision of the rent "tribunal, a notice to quit 51 Rodney Street was served on "William John Leyland. The notice to quit required William "John Leyland to vacate by December 18, 1950. (d) On the "same day that the notice to quit was served . . . William John "Leyland applied to the rent tribunal under section 11 of the "Landlord and Tenant (Rent Control) Act, 1949, for an extension "of the period at the end of which the notice to quit was to "take effect. On January 19, 1951, the rent tribunal heard the "application, which was resisted by Ethel Pickavance. They "granted the said application and extended the said period. "(e) On March 6, 1951, before such extended period had expired, "William John Leyland applied . . . for a further extension. "On April 18, 1951, the rent tribunal heard the application which "was resisted and granted an extension until June 16, 1951. "(f) On June 4, 1951, William John Leyland applied to the rent "tribunal for a further extension. This application was heard "on September 7, 1951. It was resisted on behalf of Ethel "Pickavance but the rent tribunal again extended the said period "until September 11, 1951. . . . (g) On September 9, 1951, "William John Leyland again applied to the rent tribunal for "a further extension. On October 16, 1951, the rent tribunal "heard the application which was resisted and directed that the "period should be extended until December 11, 1951.

"4. Pursuant to leave granted by a Divisional Court of the "Queen's Bench Division on December 7, 1951, Ethel Pickavance applied by notice of motion dated January 10, 1952, to "the Divisional Court for an order for certiorari to remove into "the High Court and quash the two directions of the rent tribunal "given respectively on September 7, 1951, and October 16, 1951. "The application was heard on February 12, 1952, by a Divisional "Court. . . . The court unanimously granted the order of "certiorari and quashed the directions. . . .

"5. The St. Helens and Area Rent Tribunal appealed to the "Court of Appeal. . . . On May 15, 1952, the court, Jenkins L.J. "dissenting, gave judgment dismissing the appeal with costs. "Leave was given to the rent tribunal to lodge a petition of "appeal to this honourable House upon condition that the said "rent tribunal if successful would not seek to disturb the order "as to costs in the Court of Appeal and would not ask for costs "in this honourable House."

Though the respondent had resisted the applications for extension of the tenancy made on December 9, 1950, March 6, 1951, and June 4, 1951, she had not questioned the power of the tribunal to grant them. However, the grounds of the application for certiorari were (inter alia) as follows: that ". . . (c) The "tribunal were acting without or in excess of their jurisdiction. ". . . (g) The contract between the [respondent] and the said "William John Leyland was first referred to the said rent tribunal "under section 2 of the Furnished Houses (Rent Control) Act, "1950, on August 1, 1950. The said rent tribunal gave their "decision thereon on September 8, 1950. The said notice to "quit was not served within three months after the said decision "but was served on December 9, 1950, by reason whereof the "said rent tribunal had no jurisdiction under section 5 of the "Furnished Houses (Rent Control) Act, 1946, and section 11 of "the Landlord and Tenant (Rent Control) Act, 1949, to entertain "any application by the said William John Leyland to extend "the period at the end of which the said notice should have "effect."

Sir Lionel Heald A.-G., *J. P. Ashworth* and *R. J. Parker* for the appellant tribunal. The tribunal had jurisdiction to entertain the applications which gave rise to the directions in question.

Rex v. *Folkestone and Area Rent Tribunal; Ex parte Sharkey* [1] is correct but does not affect the present case. Any dicta there which are hostile to the appellants' submissions are not part of the decision.

There is no justification for the limitation set on section 11 of the Landlord and Tenant (Rent Control) Act, 1949, by the majority of the Court of Appeal in the present case: see *per* Jenkins L.J. dissenting.[2] Section 11 introduced a radical innovation by the mere provision which enabled the previous three months' limit to be overstepped. The difference was more than one of degree. The security of tenure given was approximated to that bestowed by the Rent Restriction Acts. It is not more unreasonable to go beyond the three months in the circumstances of the present case than in those of any other. If, as is admitted, some extension is being given by the Act of 1949 to the tenant's security of tenure, it must be in a way which is of some value. The arbitrary limitation proposed would in effect destroy the additional protection altogether.

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[1] [1952] 1 K.B. 54; [1951] 2 T.L.R. 997; [1951] 2 All E.R. 921.

[2] [1952] 2 Q.B. 370, 377; [1952] 1 T.L.R. 1494; [1952] 2 All E.R. 9.

Section 5 of the Furnished Houses (Rent Control) Act, 1946, is concerned with and affects only certain notices to quit, viz., those served after a reference under section 2 and limited to expire before the end of three months from the date of the decision of the tribunal on that reference. That section (subject to the proviso thereto) automatically extends the period at the end of which such notices take effect until the expiration of the three months, and it gives the tribunal no power to extend the period at the end of which any notice takes effect; the power given is merely to cut down the statutory extension automatically imposed by the section. The section does not deal with or affect a notice to quit served after a reference and limited to expire on or after the end of the period of three months. Such a notice takes effect according to the contract and is unaffected by the section.

Section 11 (1) of the Act of 1949 in terms gives the lessee a right to apply to the tribunal to extend the period at the end of which any notice takes effect by virtue of the contract; it is thus dealing expressly with a notice to quit such as is not dealt with or affected by section 5 of the Act of 1946. Thus, although the two sections must be read together, section 11 of the Act of 1949 clearly applies to a situation unaffected by section 5 of the Act of 1946. The only restrictions and conditions precedent imposed by section 11 (1) of the Act of 1949 on a lessee's right are that (1) the contract "has been referred to a tribunal" under the Act of 1946; (2) "the reference has not been withdrawn"; (3) the tribunal has not exercised under section 5 (*a*) of the Act of 1946 the power of cutting down the statutory extension conferred by the section; (4) "a notice to quit has been served after the "reference"; and (5) "the period at the end of which the notice "takes effect . . . has not expired."

Once a tribunal has made a direction extending the period at the end of which a notice to quit takes effect, they may grant any number of further extensions, provided only that each application is made before the expiration of the extension last previously granted and that the tribunal have not previously refused a direction in relation to the notice to quit in question.

All the requisite conditions precedent laid down by section 11 were satisfied in the present case in respect of the original application of December 9, 1950, and in respect of each subsequent application, and accordingly the tribunal had jurisdiction to entertain all the applications made by the lessee and to make all the directions which they made in fact. The case falls within section 11 of the Act of 1949, which is not dependent on section 5 of the Act of 1946.

This approach is the only possible way of dealing with the case. Both Acts can live together. It is not attempted to alter the interpretation of section 5 of the Act of 1946 by reference to section 11 of the Act of 1949.

J. P. Ashworth, following. In *Rex* v. *Folkestone and Area Rent Tribunal; Ex parte Sharkey* [3] the argument presented by the successful party was twofold. It was upheld by the Divisional Court on the second of the two parts. The decision was right on either ground.

After the Act of 1949 a tenant could have three forms of security of tenure on the basis either of his contract or of the Act of 1946 or of the Act of 1949. In the Act of 1949, which is amending the Act of 1946 as respects security of tenure, the emphasis is on the period at the end of which the notice to quit takes effect, not on the date when the notice is given. Throughout section 11 a notice to quit does not mean a notice such as section 5 of the Act of 1946 contemplated. The expression "notice to quit" is there used as one of general knowledge and understanding and is not fastened to the Act of 1946. It does not need a definition to give it a meaning and it is language apt to cover the appropriate notice to quit governed by the relevant contract. It is appropriate to indicate a notice given by either party.

Section 11 of the Act of 1949 confers the right to apply for an extension of security of tenure. On that basis there cannot be any reason to limit its scope to the case of notices given within three months from the tribunal's decision. It is true that by section 11 (5) that section "shall be construed as one with the "Act of 1946," but there is enough in the section to rebut the respondent's contention on the construction of the sections, which relies on implication only, for what is suggested is not made express therein. The words "may . . . apply to the tribunal" in section 11 (1) do not confer on the tribunal a jurisdiction limited as the respondent suggests. Prima facie they confer jurisdiction to entertain such an application as this, and there is no necessary implication of the limitation contended for.

Fox-Andrews Q.C. and *John Harington* for the respondent.

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[3] [1952] 1 K.B. 54.

Virtually everything that need be said for the respondent is contained in the views expressed by the majority in the Court of Appeal and in the Divisional Court.

All this legislation has been brought into existence to deal with the practical housing problem. The rent tribunals deal with furnished lettings, while the Rent Restriction Acts deal with unfurnished lettings.

In order to get the effect for which the respondent contends one must take the relevant words out of section 5 of the Act of 1946 and put them into section 11 (1) of the Act of 1949. By section 11 (5): "This section shall be construed as one with the "Act of 1946" and so this section and section 5 of the Act of 1946 must be read as if they had been inserted consecutively in the same Act and applied to the same circumstances, section 11 being treated as being subordinate to section 5. Section 11 is an amending section and should not be treated as making any far-reaching change if adequate effect can be given to its words without producing that effect. The purpose of section 11 (5) is that the meaning of the different portions of section 11 shall be considered in the light of whatever portions of the Act of 1946 are relevant. Thus whenever in section 11 one finds an omission or doubt one must look to the Act of 1946 for guidance. The outstanding omission is that to which attention was drawn in the Court of Appeal by Morris L.J.,[4] viz., the nakedness of the phrase "notice to quit" in section 11 (1). It might mean more than one thing and that was the justification for the method of approach of Morris L.J. The kernel of the argument for the respondent is that in general "notice to quit" may mean more than one thing and that by reason of section 11 (5) it must be construed in that section as having the same meaning and limited scope as in section 5, which is the only place in the Act of 1946 where the phrase occurs. Under section 5 the notice to quit must be a notice served on the lessee before the decision of the tribunal or within three months thereafter, and so section 11 applies only in the case of such a notice given within that time. If the conditions precedent to bringing section 5 into operation do not exist, section 11 cannot come into operation either. The effect, therefore, is that on the true construction of section 11 of the Act of 1949 construed as one with the Act of 1946 the rent tribunal has no jurisdiction to extend the period at the end of which a notice to quit shall take effect unless that notice has been served after the reference to the tribunal and within three months after the tribunal's decision. A contrary decision would impose hardship on landlords because any tenant who had once made an application to a tribunal might apply for an extension at an indefinitely remote period.

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[4] [1952] 2 Q.B. 370, 387.

Rex v. *Folkestone and Area Rent Tribunal; Ex parte Sharkey*[5] shows that the object of section 5 of the Act of 1946 was to prevent retaliation by the landlord. Section 11 gave no new power to the tribunal. See also *Reg.* v. *St. Helens and Area Rent Tribunal; Ex parte Pickavance*,[6] in the Divisional Court, *per* Lord Goddard C.J. and Parker J. The object of section 11 of the Act of 1949 was (as shown by the title of the Act) to extend the "security of tenure" afforded by section 5 of the Act of 1946. It confers advantages on the tenant, but if, in the circumstances of any case, the Act of 1946 provides no security of tenure, there is nothing for section 11 to extend. The respondent relies also on *Rex* v. *Folkestone and Area Rent Tribunal; Ex parte Sharkey*,[7] *per* Hilbery J.

As to the effect of amending legislation, see *Union of South Africa (Minister of Railways and Harbours)* v. *Simmer & Jack Proprietary Mines Ld.*,[8] *Aristoc Ld.* v. *Rysta Ld.*[9] and *River Wear Commissioners* v. *Adamson.*[10] The appellant's contention proposes to produce by an amending Act a substantial alteration destructive of the earlier provisions.

John Harington, following. The words "a notice to quit" in section 11 (1) of the Act of 1949 refer to a notice of the same kind as that described in section 5 of the Act of 1946, viz., "a "notice to quit the premises to which the contract relates . . . "served by the lessor on the lessee at any time before the decision "of the tribunal is given or within three months thereafter." These words are necessary for the understanding of section 11 (1) of the Act of 1949, and they govern it. Unless the meaning of "notice to quit" is the same in both sections a definition would be necessary in the case of the use of the phrase in the later Act.

Sir Lionel Heald A.-G., in reply. The last argument for the respondent tells the other way. If in the case of the Act of 1949 one wants to know what sort of a notice to quit is referred to, it is shown by section 5 of the Act of 1946 to be "a notice to quit

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[5] [1952] 1 K.B. 54, 56.

[6] [1952] 1 T.L.R. 455, 456, 458.

[7] [1952] 1 K.B. 54, 58–9.

[8] [1918] A.C. 591, 596.

[9] [1945] A.C. 68, 92; 61 T.L.R. 121; [1945] 1 All E.R. 34.

[10] (1877) 2 App.Cas. 743, 763.

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"the premises to which the contract relates" and no other premises. The words following are merely a qualification.

The questions arising as to the proper approach to a later statute, which is to be construed as one with an earlier statute, are very difficult: see Craies on Statute Law, 5th ed., p. 130 (referring to *Reg.* v. *Johnson*[11]) and pp. 131–2. *Aristoc Ld.* v. *Rysta Ld.*[12] and *Union of South Africa* (*Minister of Railways and Harbours*) v. *Simmer & Jack Proprietary Mines Ld.*[13] do not affect this case. In so far as an essential or radical change can be said to have been effected, it is the introduction of the possibility of consecutive applications for security of tenure, but it is admitted that such applications can now be made, and by that new conception one has in any case departed from freedom of contract between landlord and tenant. The change contended for by the appellant tribunal is not radical to the same extent.

"Notice to quit" should not be read in the same sense in the two sections. There is no reason for cutting down the interpretation of the words in section 11, and it has not been shown that there was any fundamental error in the dissenting judgment of Jenkins L.J. in the Court of Appeal.

Their Lordships took time for consideration.

June 25. LORD PORTER. My Lords, this is an appeal from a judgment of the Court of Appeal dismissing an appeal of the appellants' predecessors, the St. Helens and Area Rent Tribunal, from a judgment of the Divisional Court of the Queen's Bench Division which ordered that directions given by that rent tribunal on September 7, 1951, and October 16, 1951, be removed into the High Court of Justice, Queen's Bench Division, and that thereupon those directions be quashed. By an order dated November 5, 1952, the present appellants who now represent the former rent tribunal were substituted as a party in its place.

The question involved in the case concerns primarily section 5 of the Furnished Houses (Rent Control) Act, 1946, and section 11 of the Landlord and Tenant (Rent Control) Act, 1949. Section 5 of the Act of 1946 is in the following terms: "If, after a contract "to which this Act applies has been referred to a tribunal by the "lessee or by the local authority (either originally or for recon-"sideration), a notice to quit the premises to which the contract

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[11] (1845) 8 Q.B. 102, 106.

[12] [1945] A.C. 68.

[13] [1918] A.C. 591.

"relates is served by the lessor on the lessee at any time before "the decision of the tribunal is given or within three months "thereafter, the notice shall not take effect before the expiration "of the said three months: Provided that—(*a*) the tribunal may, "if they think fit, direct that a shorter period shall be substituted "for the said three months in the application of this section to "the contract that is the subject of the reference; and (*b*) if the "reference is withdrawn, the period during which the notice is "not to take effect shall end on the expiration of seven days from "the withdrawal of the reference."

Section 11 of the Landlord and Tenant (Rent Control) Act, 1949 (hereinafter called "the Act of 1949") is in the following terms: "(1) Where a contract to which the Act of 1946 applies "has been referred to a tribunal under that Act, and the "reference has not been withdrawn, the lessee may, at any time "when a notice to quit has been served and the period at the "end of which the notice takes effect (whether by virtue of the "contract, of the Act of 1946 or of this section) has not expired, "apply to the tribunal for the extension of that period: Provided "that an application shall not be made under this section where "the tribunal have directed, under paragraph (*a*) of the proviso "to section 5 of the Act of 1946, that a shorter period shall be "substituted for the period of three months specified in that "section as the period before the end of which a notice to quit "shall not have effect. (2) On an application being made under "this section—(*a*) the notice to quit to which the application "relates shall not, unless the application is withdrawn, have "effect before the determination of the application; (*b*) the "tribunal, after making such inquiry as they think fit, and "giving to each party an opportunity of being heard, or, at his "option, of submitting representations in writing, may direct "that the notice to quit shall not have effect until the end of "such period, not exceeding three months from the date at "which the notice to quit would have effect apart from the "direction, as may be specified in the direction; (*c*) if the "tribunal refuse a direction under this section, the notice to "quit shall not have effect before the expiration of seven days "from the determination of the application. (3) On coming to a "determination on an application under this section the tribunal "shall notify the parties of their determination. (4) Where on "an application under this section the tribunal have refused a "direction under subsection (2) thereof, no subsequent applica- "tion under this section shall be made in relation to the same "notice to quit. (5) This section shall be construed as one with "the Act of 1946, and references in this section to that Act "shall be construed as references to that Act as extended by "section 7 of this Act."

[His Lordship stated the facts and continued:] Before the true construction of the relevant sections is discussed, it is, I think, desirable to bear in mind the exact position of the tenant at the time when the three months' protection given by the Act of 1946 came to an end. At that moment he was still in possession of the premises under his contract of tenancy and no application for an extension of time was then necessary. Indeed, subject to the possibility that notice might be given at some future date there was nothing of which to ask an extension. It would only be required if, as the respondent asserts, the tribunal had jurisdiction only to grant its first extension, provided application was made within the statutory three months. It is in the light of these circumstances that the material sections of the two Acts have to be construed.

In this state of facts the tenant contends that his case plainly comes within the provisions of section 11 of the Act of 1949. His contract, he says, had been referred to a tribunal and had not been withdrawn. A notice to quit had been served and the period at which the notice took effect had not expired.

The scheme adopted in the two Acts apparently was that the termination of the tenancy brought about by the notice should not take effect until the hearing should be concluded, and under the earlier Act that the tenancy itself should be extended to a date three months after the determination of the application by the tribunal. So far as I understood the argument on behalf of the respondent, the method by which protection is given to the tenant is so interpreted by both sides: the only difference between the parties being as to whether the first application for extension must be made within the three months.

The argument on behalf of the respondent was, as I think, most succinctly put by Morris L.J. in the Court of Appeal when he said[1]: "The requirement that section 11 must be construed "as one with the Act of 1946 makes it inappropriate to consider "the words of section 11 (1) in isolation. The phrase 'at any "'time when a notice to quit has been served and the period "'at the end of which the notice takes effect . . . has not

[1] [1952] 2 Q.B. 370, 388; [1952] 1 T.L.R. 1494; [1952] 2 All E.R. 9.

" 'expired' refers, in my judgment, to the period between the " serving of a notice to quit and its time of taking effect. But " the words 'a notice to quit' are not explained. It is not " specified by whom the notice is to be given nor is there any " mention as to the time of its service. This omission is " explained if the reference is to a notice to quit as specified in " the Act of 1946. It is only in section 5 in the Act of 1946 " that a notice to quit is referred to. The phrase 'a notice to " 'quit' in section 11 in my judgment denotes a notice to quit " of the particular kind set out in section 5, that is, a notice to " quit served by the lessor on the lessee at any time before the " decision of the tribunal is given, or within three months " thereafter.

" The important words in section 11 are as follows: '. . . at " 'any time when a notice to quit has been served and the period " 'at the end of which the notice takes effect (whether by virtue " 'of the contract, of the Act of 1946 or of this section) has not " 'expired. . . .' If the period at the end of which 'the notice' " takes effect is being fixed by virtue of the Act of 1946—it is " plain that 'the notice' referred to is a notice to quit served " by the lessor on the lessee at any time before the decision of " the tribunal is given or within three months thereafter. It is " a notice to quit of the same kind which, in my judgment, is " referred to if the period at the end of which the notice takes " effect is being fixed by virtue of the contract or by virtue of " section 11."

Undoubtedly if it were not for the provisions of section 11 of the Act of 1949 the landlady would be entitled to possession at the end of the three months or at the moment at which the notice to quit expired, whichever might be the later date, and in that case no extension beyond the relevant period could be given. But the material period is not necessarily the ending of the three months; it may be the termination of the period of a notice that ends at a later date.

What, then, is the effect of the provisions of section 11? I cannot say that I myself gain any assistance in construing it from the insertion of the words " the lessee may, at any time . . . , " apply to the tribunal for the extension of that period ": they are qualified by the condition that a notice to quit must have been " served " and that the date for quitting the premises should not have expired, but in no other way. Nor am I helped by the provision that the reference must not have been withdrawn.

Its object is to ensure that the applicant should make up his mind once for all which course he intends to adopt.

Taking the wording of section 11 by itself, every word is given due weight if the construction propounded by the appellants is adopted—and notably so in the phrase " the period at the end " of which the notice takes effect (whether by virtue of the " contract, of the Act of 1946 or of this section) has not expired." This expression seems to deal with three separate periods within which an application for extension may be made, i.e. (1) if the contractual period of notice is still running; (2) if that period has been extended by the three months respite given by the Act of 1946; and (3) if a further extension has been given under the 1949 Act and application is made before that extension has expired.

On the other hand, if the respondent's construction is adopted, I find it difficult to attribute their full and natural effect to the words " by virtue of the contract." According to the construction contended for on her behalf, as I understand it, " the period " at the end of which the notice takes effect . . . by virtue of the " contract " must be limited to the period at which a notice to quit, which has been given within the three months exemption, has not expired.

The whole strength of the respondent's argument depends upon an insistence that inasmuch as under section 11 (5) of the Act of 1949 that section is to be construed as one with the Act of 1946, a notice to quit under both sections has the same connotation. Under section 5 the notice to quit must be a notice served on the lessee before the decision of the tribunal or within three months afterwards; therefore, it is argued, section 11 applies only where a notice has been given within this time; the two sections should be read as if they had been inserted consecutively in the same Act and applied to the same circumstances.

Even if they had been so inserted in one Act I should not have taken this view. I cannot see that the provisions of section 11 require or even suggest such a construction. The expression " the period at the end of which the notice takes effect " . . . by virtue of the contract " is couched in the widest terms and prima facie refers to any notice whenever given which is still running.

No doubt the giving of further time must be an extension of an existing tenancy, but in the present case the tenant remained in possession as a contractual tenant until the expiry of the notice to quit and was still a tenant until that moment. He comes under section 11 because the only step taken to end his tenancy was the notice to quit given on October 9, 1950, and the period of that notice had not expired.

It is suggested that to construe the section in this way is a hardship on the landlord because, if it be right, a tenant who had once made an application to the tribunal might at some long subsequent time apply for an extension. But this argument assumes that the landlord refrains from giving notice until a remote future time. In fact he always has the remedy in his own hands: he can give notice at any time; a notice which may even end before the three months though it will not be effective until after that date.

Moreover, it has to be borne in mind that the Act of 1949 does not provide that section 11 is to be read with section 5 of the earlier Act: it is to be read with that Act generally and there are many other provisions of that Act to which that reference is applicable, e.g., section 2 (1) and (3).

Such an application seems to me to justify the use of the words "read with" in section 11 of the Act of 1949, and negatives the necessity of confining the meaning of those words in that Act to a notice such as would be required under section 5 of the Act of 1946.

The expression "notice to quit" is a well known form of words which conveys a well recognized meaning and should be given its ordinary significance unless there is some overriding necessity for limiting its scope.

No doubt it is in one sense a hardship on the landlord to be subject in the case of a furnished lodging to a suspension of his right to recover possession. But this hardship exists in the case of an unfurnished tenancy, where the restriction is plainly established, and there is nothing exceptional in finding a limitation, though to a lesser degree, where the premises are let furnished.

It is urged, however, that to accept the appellants' contention would be to make a substantial alteration by an amending law which is destructive of the earlier provisions, and such cases as *Union of South Africa (Minister of Railways and Harbours)* v. *Simmer & Jack Proprietary Mines Ld.*,[2] *Aristoc Ld.* v. *Rysta Ld.*,[3] and *River Wear Commissioners* v. *Adamson*[4] were quoted in support of the contention that an amending statute should not be so construed. What is a substantial alteration may be a matter of some difficulty, but in the present case I do not find the alteration said to be effected either so substantial or destructive of the provisions of the earlier Act as to lead me to reject what I think is the more obvious meaning. Moreover it is at least arguable that section 11 does make an alteration in one matter. Section 5 applies only in a case where the contract has been referred to the tribunal by the lessee or local authority. Under section 2 (1) of the Act of 1946, however, either the lessor or lessee or local authority may refer it and therefore as the two Acts are to be construed as one, section 11 of the Act of 1949 enables a lessee to apply to the tribunal for an extension not only where he himself has referred the matter but also where his lessor has done so.

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[2] [1918] A.C. 591, 596.

[3] [1945] A.C. 68, 92; 61 T.L.R. 121, 126; [1945] 1 All E.R. 34, 42.

[4] 2 App.Cas. 743, 763.

The Divisional Court have found some support for their decision in the case of *Rex* v. *Folkestone and Area Rent Tribunal; Ex parte Sharkey.*[5] The decision in that case was that neither section could be called in aid where a notice had been given before the tenant's application was made to the tribunal: a decision which I should have thought clearly right on the wording of section 5. But it is suggested that the reasoning in that case showed that the object of section 5 was to prevent retaliation by the landlord, as the Lord Chief Justice says, and that section 11 gave no new power to the tribunal. I cannot myself accept so limited an application. Obviously the later Act did give some new power since without it there could have been no additional extension of the tenancy. The only question is how far that power extends.

It will be observed that in this analysis I have made no reference to the anomalies which would result from either of the constructions sought to be put upon the section.

My reason for adopting this course is that admittedly, whichever reading is preferred, unconsidered and anomalous results must follow. They have been referred to by the Lord Chief Justice and in the Court of Appeal by Morris L.J. on the one side and by Jenkins L.J. on the other. To my mind they cancel one another out and neither party can draw any satisfactory support from them.

I found my decision on what I regard as the natural meaning of section 11 and see no sufficient reason for limiting its effect. I would allow the appeal.

My Lords, my noble and learned friend, LORD OAKSEY, is not able to be present and has asked me to say that he has had the advantage of reading the opinion of Lord Reid, which will be read hereafter, and that he agrees with it.

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[5] [1952] 1 K.B. 54; [1951] 2 T.L.R. 997; [1951] 2 All E.R. 921.

LORD REID. My Lords, the Furnished Houses (Rent Control) Act, 1946, provided for tribunals being set up to deal with rents of furnished houses and other residential accommodation not covered by the Rent Restriction Acts. The lessor or the lessee or the local authority may apply to the local tribunal and the tribunal may approve the rent payable under the parties' contract or reduce it or dismiss the application. If a rent is approved or reduced it is entered in a register and no more than that rent can thereafter be charged for the premises. But on change of circumstances the case can be reconsidered by the tribunal and then the rent may be either increased or reduced.

Apparently it was thought that if the lessee or the local authority applied to the tribunal the lessor might seek to retaliate by giving notice to quit, and, as such premises are often held by the lessee on as little as a week's notice, the possibility of such retaliation might well deter lessees or local authorities from applying to the tribunal. Accordingly the Act by section 5 gives a limited measure of security of tenure to lessees.

[His Lordship read the section and continued:] For the purposes of the present case it is, I think, enough to note (1) that if the application to the tribunal was made by the lessor, then section 5 has no effect and the lessor is entitled at any time to give and enforce notice to quit in the ordinary way; (2) that if the application was made by the lessee or local authority the protection given by the Act applies whether or not the applicant was successful in getting the rent reduced, and that protection can only be modified by the tribunal giving a direction under proviso (*a*) of section 5; and (3) that the Act does not invalidate any notice to quit but only provides that notices which would otherwise have taken effect within three months after the decision of the tribunal shall not take effect until that period has elapsed. Whether or not section 5 confers any benefit on the lessee depends not on the date when notice to quit is given but on whether the notice would or would not have taken effect before the expiry of the three months, and a notice given within the three months but not due to take effect until after that period is not touched by the section. In effect the Act provides that the lessee's occupation cannot be brought to an end by the lessor within the three months unless the tribunal gives a direction which allows that to be done. And there is nothing in the Acts enabling the period of three months to be extended.

Three years later the Landlord and Tenant (Rent Control) Act, 1949, was passed, and one of its objects was "to amend the "Rent of Furnished Houses Control (Scotland) Act, 1943, and "the Furnished Houses (Rent Control) Act, 1946, as respects "security of tenure" (I quote from the long title of the Act). The only section of the Act which deals with the position in England is section 11.

[His Lordship read section 11 and continued:] The sole question before your Lordships is whether section 11 has any application in this case. In 1948 the respondent let to a Mr. Leyland a furnished house in St. Helens on a weekly tenancy. In August, 1950, the tenant made an application to the local tribunal with the object of getting his rent reduced, but he was unsuccessful, and on September 8 the tribunal approved the existing rent of £1 per week. Section 5 of the Act of 1946 would have applied if the respondent had given notice to quit to take effect before December 8, but she did not do so. She did, however, give notice to quit on December 9, to take effect on December 18. During the currency of this notice the tenant made application to the tribunal under section 11 of the Act of 1949 for extension of the period of notice and the tribunal extended the period until March 11, 1951. Further applications were made and granted by which the period was successively extended to June 11, September 11 and December 11. The respondent had objected to all these applications on certain grounds, but she had not questioned the power of the tribunal to grant them. But when the next application came before the tribunal, she took the point that the case had never fallen within the scope of section 11 because section 11 only applies if notice to quit has been given within three months of the date of the decision of the tribunal and her notice was not given within that period. She maintained that the tribunal had no power to grant any of these applications, and that is the point which is now in issue.

That question depends on the proper interpretation of the initial part of section 11. The first three requirements of the section are undoubtedly satisfied in this case. The contract was one to which the Act of 1946 applied; it was referred to a tribunal under that Act, and the reference was not withdrawn. The section then provides: "The lessee may, at any time when a "notice to quit has been served and the period at the end of

" which the notice takes effect (whether by virtue of the contract, " of the Act of 1946 or of this section) has not expired, apply to " the tribunal for the extension of that period." Certainly this phraseology is involved and it requires careful analysis, but after studying it I do not think that there can be much doubt about what these words would mean if they were read by themselves. The real difficulty begins when one reads them in their context, but first one must see what they would mean by themselves.

The words between the commas state the limits of time between which the lessee may apply to the tribunal; he may apply at any time between the service of the notice to quit and the expiry of the period at the end of which the notice is due to take effect. The words within the brackets set out the three possible ways in which the period of notice would come to an end and the notice would take effect if it were not extended by application under section 11. First, a notice may take effect by virtue of the contract; that applies in a case where the Act of 1946 has not extended the period of notice because the date when the notice to quit would take effect in the ordinary way is more than three months after the date of the decision of the tribunal. Secondly, a notice may take effect by virtue of the Act of 1946; that applies in a case where the notice to quit would, but for that Act, have taken effect before the expiry of the three months, but section 5 has prevented that and has extended the period of notice to the end of the three months. And, thirdly, a notice may take effect by virtue of "this section," i.e., section 11 of the 1949 Act; that applies in a case where the lessee has already obtained one or more extensions under section 11 and is seeking a further extension; he must then apply for that before the end of the last extension.

There are no words which state that the section only applies if the notice to quit has been given within some time limit, and there are no words which state that the section applies if the notice is given at any time. The words "at any time" which follow the comma do not refer to the time when the notice may be given; they refer to the time when application may be made to the tribunal. So the words with which I have been dealing do not enact any limitation of time within which notice to quit must be given if section 11 is to apply, but they do not exclude such a limitation being read in by implication if a sufficient reason for doing this can be found elsewhere.

The part of section 11 on which the respondent relies as requiring such a limitation is subsection (5), which provides:

"This section shall be construed as one with the Act of 1946 . . ." In my opinion this means neither more nor less than that section 11 must be read as if it were a section in the 1946 Act. There is no difficulty about so reading it. It does not alter or amend anything in the 1946 Act. It adds something new, which is materially different in character from anything in the 1946 Act. The lessee's right under section 5 of that Act arises automatically, but it can only last for a short time. The lessee's right under section 11 of the 1949 Act only arises on an express decision of the tribunal, but if the tribunal so choose it can be continued for an indefinitely long period.

The respondent's argument requires that section 11 shall be treated as in some way subordinate to section 5. The argument was put in various ways. It was said that "notice to quit" in section 11 must have the same limited meaning and scope as it has in section 5, which is the only place in the 1946 Act where that phrase occurs, and that if the conditions precedent to bringing section 5 into operation do not exist they cannot arise under section 11. And then it was said that section 11 is an amending section and that an amendment should not be held to make a fundamental or far-reaching change if adequate effect can be given to the words of the amendment without producing that result. These arguments might have great weight if section 11 could be read as only conferring some additional protection in cases where a limited protection had already been given by section 5. But I find it impossible so to read section 11. Section 11 appears to me to apply to some cases which are wholly outside the scope of section 5. Section 5 is expressly limited to cases where the reference to the tribunal has been made by the lessee or the local authority, whereas there is no such limitation expressed in section 11. Section 11 could not have been drafted without the terms of section 5 being prominently in view, and the failure to repeat the limitation to cases where the reference was by the lessee or the local authority must have been deliberate. So section 11 must be held to apply to cases where the reference to the tribunal was by the lessor and no proceedings had been initiated by the lessee or local authority before the notice to quit; and section 11 must, therefore, have a wider object than merely to afford some defence against retaliation by the lessor if the lessee or local authority invokes the statutory procedure. Then the words "by virtue of "the contract" within the brackets near the beginning of section 11 do not consist well with the respondent's argument. As I have already said, they apply and can only apply to cases

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where section 5 has not applied to extend the period of notice; if section 5 had applied the notice would take effect by virtue of the Act of 1946. On the respondent's argument the words "by "virtue of the contract" have an exceedingly limited application. The respondent does not argue that section 11 only applies when section 5 has already applied to the case; that would deny all force to these words. The argument is that section 11 only applies if the notice to quit was given within the period mentioned in section 5, and on that view there might be a case where the lessor gave notice shortly before the expiry of the three months but the notice was not due to take effect until after the end of the three months, and the words "by virtue of the contract" would then apply. But the wording of section 11 does not suggest so limited an application. And another difficulty emerges if I am right in thinking that section 11 applies to cases where the original reference was by the lessor; section 5 has no application to them, and it is not easy to see why the period mentioned in section 5 should be imported into section 11 so as to affect them.

I find no similar difficulties involved in the interpretation for which the appellants contend. Section 11 is not dependent on section 5, and once the three initial conditions in section 11 are satisfied any lessee on whom a notice to quit is served can apply to the tribunal whatever be the interval between the original decision of the tribunal and the service of the notice. So far as I can see, the only substantial objection to this interpretation is that it gives rise to serious anomalies in the practical application of the Act. But the respondent's interpretation gives rise to others hardly less substantial. And anomalies are inevitable under a scheme which gives nothing to tenants whose contracts have not been referred to a tribunal, but may give to others, although their application to the tribunal has been unsuccessful, a right to remain in possession for as long as the tribunal will allow, there being no direction or guidance to tribunals as to how or on what principles they are to exercise this novel jurisdiction. Accordingly, I do not think it right in this case to take account of considerations of a general character which might be relevant if only one of the competing interpretations produced anomalies. Simply taking the words of the Acts as they stand, I am satisfied that the appellants' interpretation is the more natural and straightforward and I think that it is, therefore, to be preferred. I agree that the appeal should be allowed.

LORD TUCKER. My Lords, this appeal turns upon the meaning of the words " a notice to quit " in section 11 (1) of the Landlord and Tenant (Rent Control) Act, 1949. It is, I think, agreed by both sides and by all the judges who have dealt with this case that section 11 standing by itself is unambiguous and in its ordinary and natural meaning would apply to a notice to quit given at any time. It is, however, contended by the respondent that the words " a notice to quit " should be given a restricted meaning because subsection (5) of section 11 provides " this section shall be con-" strued as one with the Act of 1946, and references in this section " to that Act shall be construed as references to that Act as " extended by section seven of this Act." It is said that the result of this subsection is that " a notice to quit " must mean *the* notice to quit referred to in section 5 of the Act of 1946, viz., a notice to quit the premises to which the contract relates served by the lessor on the lessee at any time before the decision of the tribunal is given or within three months thereafter. Section 5 of the Act of 1946 is the only section which mentions a notice to quit. This is the construction which has found favour with the Divisional Court and the majority in the Court of Appeal.

The exact consequence of a provision that one Act is to be construed as one with another, beyond incorporating the definitions contained in the first Act, is not altogether easy to ascertain, because it would seem that if both Acts are dealing with the same subject-matter it would in any event in a case of ambiguity be necessary to construe the second Act in the light of the provisions of the first. In the present case, having regard to section 8 of the Act of 1946, which gives power to make procedural regulations, it would seem that in order to make it clear that such regulations apply to applications under section 11 of the Act of 1949 some such provision as that contained in subsection (5) was desirable. I am, however, prepared to accept the respondent's contention that one result of subsection (5) is that section 11 should be construed as if it were inserted immediately after section 5 in the Act of 1946, and I therefore approach its construction on that footing.

It would have been a most remarkable piece of draftsmanship if section 11 of the Act of 1949 in its present form had been inserted immediately after section 5 in the 1946 Act with the intention of producing the result contended for by the respondent. The opening words of section 11 are " Where a contract to which " the Act of 1946 applies has been referred to a tribunal under that " Act," not—be it observed—under section 5 of that Act, but "under that Act." If section 11 followed section 5, and the draftsman had intended in section 11 to include only references under section 5, he would have said "has been referred to a "tribunal under the preceding section," and to achieve the same result in a subsequent Act he would have said "has been referred "to a tribunal under section 5 of the Act of 1946." It seems to me, therefore, clear that at the outset section 11 is dealing with references which are not limited to references made under section 5 of the Act of 1946 but must include references by the lessor under the provisions of section 2 of the Act of 1946. This view is, I think, strengthened by the fact that subsection (5) of section 11 of the 1949 Act requires that section 11 shall be construed as "one with the Act of 1946," not as one with section 5 of that Act.

Proceeding, therefore, on the basis that at the outset the subject-matter of section 11 extends beyond the subject-matter of section 5, I cannot understand what rule of construction can limit the later words "a notice to quit" to the particular kind of notice referred to in section 5. If this had been intended the draftsman would surely have said "a notice to quit served within "the period referred to in the preceding section," or would have repeated the language of that section, or in a later Act would have said "a notice to quit served within the period referred to "in section 5 of the Act of 1946," or more probably would have repeated the language of the former section. Instead of this we find the general words "a notice to quit" used in contrast to the restricted kind of notice which has been dealt with in the section which for present purposes we are considering as if it had preceded section 11. The fact that in section 11 the words "the "premises to which the contract relates" have not been repeated, although the notice referred to must necessarily be a notice to quit the premises to which the contract relates, is not sufficient to persuade me that "a notice to quit" is merely an abbreviated reference to the notice referred to in section 5 being a notice served within the limits of time therein prescribed. The opening words of section 11: "Where a contract to which the Act of "1946 applies has been referred," make it clear that the notice to quit must be a notice to quit the premises to which such contract relates, though it would no doubt have been tidier to repeat the words which had been used in section 5.

In the result I can find no justification for restricting the ordinary meaning of the language of section 11, especially in view of the fact that the section is admittedly designed to extend the

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security of tenure afforded by section 5. The limits of that extension must, I think, be ascertained from the ordinary meaning of the language used read in conjunction with the Act of 1946, including section 5, and so read do not necessarily impose the limits contended for by the respondent.

My Lords, I have endeavoured to explain in my own words my reasons for differing from the construction placed upon this section by five of the six judges in the courts below, but I am conscious that I have added little, if anything, to the detailed analysis of these sections by Jenkins L.J., and I would only add that I can find nothing in the other judgments, nor have I heard anything in the course of argument before your Lordships, which demonstrates any flaw or fallacy in the process of reasoning by which he arrived at the conclusion that the applicant for the order of certiorari had failed to establish a lack of jurisdiction in the tribunal.

I would accordingly allow the appeal.

Lord Asquith of Bishopstone. My Lords, I had prepared an opinion in this case; but I shortly afterwards had the advantage of reading that of my noble and learned friend, Lord Reid, and I find myself in such complete agreement with it that I thought and think that it would serve no purpose to add an independent contribution of my own. I agree that the appeal should be allowed.

Appeal allowed.

Solicitors: *Solicitor to the Ministry of Health; Neve, Beck & Co., for Joseph Davies & Son, St. Helens.*

J. C.*
1953
July 21.

CEYLON MOTOR INSURANCE ASSOCIATION LD. . . . . Appellants;

AND

P. P. THAMBUGALA . . . . . Respondent.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Ceylon — Insurance — Motor-car — Third party risks — Whether valid "notice of action"—Motor Car Ordinance, No. 45 *of* 1938, *ss.* 133, 134.

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* *Present*: Lord Porter, Lord Tucker, Lord Asquith of Bishopstone, Mr. T. Rinfret (Chief Justice of Canada), and Mr. L. M. D. de Silva.

The proctors of the respondent, who had been injured by a motor-car, the owner of which was insured against third party risks by the appellant insurance company in accordance with the requirements of the Motor Car Ordinance, 1938, of Ceylon, wrote to the appellants on May 21, 1946: "Re Car No. X—4851. We are "instructed by [the respondent] . . . to file an action for the "recovery of Rs. 15,000 against [the owner of the car] . . . being "damages sustained by our client . . . on September 1, 1945, by reason "of the negligent and careless driving on the part of his driver ". . . unless our client's claim is settled on or before the 31st "instant, we are instructed to file action against the owner of "the car." In an action against the owner of the car the respondent, on June 25, 1948, obtained a decree for Rs. 10,000, with legal interest and costs, which in all amounted to Rs. 13,881 on April 5, 1950, when he instituted proceedings pursuant to section 133 of the Ordinance for the recovery of that sum from the appellants. The company sought to avoid liability on the ground that they had received no notice of action as required by section 134 of the Ordinance which provides that: "No sum shall be payable "by an insurer under the provisions of section 133—(*a*) in respect "of any decree, unless before or within seven days after the com"mencement of the action in which the decree was entered, notice "of the action had been given to the insurer by a party to the "action; . . .":—

Held, that the name and address of the proposed plaintiff, the name of the owner of the car and its number, the date of the accident and the sum claimed as damages in the letter of May 21, 1946, were elements which, taken together, constituted it a sufficient notice of action under section 134 of the Ordinance. The section did not require that the name of the court should be given; and the words in the letter "unless our client's claim is settled," meant "settled by you"—the appellants; but that even if they meant "settled by you or someone else," they did not vitiate the notice.

Weldrick v. *Essex & Suffolk Equitable Insurance Society Ld.* (1949) 83 Ll.L.Rep. 91 considered.

Lewis v. *Smith* (1815) Holt's N.P., C.P. 27, distinguished.

Decree of the Supreme Court of Ceylon affirmed.

APPEAL (No. 33 of 1952) from a judgment and decree of the Supreme Court of Ceylon (May 20, 1952) affirming a judgment and decree of the District Court of Colombo (October 24, 1950).

The following facts and statutory provisions are taken substantially from the judgment of the Judicial Committee: The respondent had been injured by a car belonging to one K. Stephen Perera, who had been duly insured against third party risks with the appellant company in accordance with the requirements of the Motor Car Ordinance, No. 45 of 1938. On May 21, 1946, the respondent's proctors wrote the following letter to the appellant company: "Re Car No. X—4851.

"We are instructed by Mr. P. P. Thambugala of . . . to file "an action for the recovery of Rs. 15,000 against Mr. Kodituwakku Aratchige Stephen Perera of . . . being damages "sustained by our client as a result of the above car knocking "down our client on September 1, 1945, by reason of the negligent and careless driving on the part of his driver.

"We are given to understand that the above car has been "insured with your company.

"Our client is still under treatment and unless our client's "claim is settled on or before the 31st instant, we are instructed "to file action against the owner of the car."

In reply, the appellants, by their letter dated May 23, 1946, acknowledged receipt of the letter from the respondent's proctors, and said: "We have hitherto been totally ignorant of any accident in which the above car had been involved, and this is "the first intimation we have of an accident to the above or an "impending third party claim.

"Since the insured has failed to report the accident in terms "of the conditions of the policy issued to him, we would advise "you to communicate with the owner of the vehicle direct in "the matter."

In an action in the District Court of Colombo the respondent, on June 25, 1948, obtained a decree against Perera for Rs. 10,000 with legal interest and costs. The amount due on that decree on April 5, 1950, was Rs. 13,881.22. The respondent, availing himself of the provisions of section 133 of the Motor Car Ordinance, brought this action on that day for the recovery of the said sum from the appellant company.

Section 133 of the Ordinance provided:—

"133.—(1) If after a certificate of insurance has been issued "under section 128 (4) to the persons by whom a policy has been "effected, a decree in respect of any such liability as is required "by section 128 (1) (*b*) to be covered by a policy of insurance "(being a liability covered by the terms of the policy) is obtained "against any person insured by the policy, then notwithstanding "that the insurer may be entitled to avoid or cancel, or may have "avoided or cancelled, the policy, the insurer shall, subject to "the provisions of sections 134 to 137, pay to the persons entitled "to the benefit of the decree any sum payable thereunder in "respect of that liability, including any amount payable in respect

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" of costs and any sum payable in respect of interest on that sum " under such decree.

" (2) In this section, ' liability covered by the terms of the " ' policy ' means a liability which is covered by the policy or " which would be so covered but for the fact that the insurer is " entitled to avoid or cancel, or has avoided or cancelled, the " policy."

Section 134 was to the following effect:—

" 134. No sum shall be payable by an insurer under the provisions of section 133—

" (*a*) in respect of any decree, unless before or within seven " days after the commencement of the action in which the decree " was entered, notice of the action had been given to the insurer " by a party to the action; or

" (*b*) in respect of any decree, so long as execution thereof is " stayed pending appeal."

The District Judge gave judgment for the respondent for the sum claimed, and his decision was affirmed by the Supreme Court of Ceylon (Nagalingam A.C.J. and Swan J.).

The insurance company appealed.

The sole issue in the appeal was whether the letter of May 21, 1946, was an adequate notice of action within the meaning of section 134 of the Ordinance.

1953. June 8, 9. *Geoffrey Cross Q.C.* and *R. K. Handoo* for the appellants. The amount involved is not in dispute, but the appellants regard this as somewhat in the nature of a test case, and are anxious to obtain some guidance from the courts as to what does constitute notice under the terms of the Ordinance. Section 133 imposes the liability. In general the Ordinance follows the English Road Traffic Act of 1934; the only difference material to this case is between section 134 of the Ordinance and section 10 (2) (*a*)—the parallel section—of the English Act, where the words are " unless . . . the insurer had notice of the bringing " of the proceedings." It is of vital importance to an insurance company to have notice under section 134 for various reasons, because unless they know when the action is started they may find themselves unable to avail themselves of sections 135, 136 and 137 of the Ordinance in respect of their claim for a declaration of non-liability.

The only issue in the present case was whether the letter of May 21, 1946, was adequate notice of action within the meaning of section 134; it was not suggested that there was any other notice at all. There are two broad grounds on which the appellants submit that the notice was not sufficient. There is, first, a distinction—and the English cases bear out this distinction—between a notice of intention to bring an action within the meaning of a statute of this sort, and the making of a claim coupled with a threat of legal proceedings if it is not met. The letter was no more than a demand or invitation to settle the respondent's claim under threat of legal proceedings, and as such was not the unambiguous and unconditional "notice of the action" contemplated by the section. The notice here was a conditional one.

Secondly, on the true interpretation of the section, the words "notice of the action" must be taken to mean notice of an action which has been instituted or which it has been definitely decided to institute in a specified court on or about a specified date. If it is decided to give notice, not of the writ itself, but by anticipation or intention, then at least the court in which the action is to be brought must be specified, for unless the insurers to whom notice is given know the court they will not be able to trace whether the action has been brought or not. It was said in the judgment of the Supreme Court that: "It seems to me that . . . "what the section requires is that notice should have been given "of the action in which the decree was entered and that notice "would be adequate if the action that is filed subsequently can "be identified as the action in contemplation of which notice "had been given." It is submitted that that is not the proper test.

In *Lewis* v. *Smith*,[1] Gibbs C.J. was drawing a distinction between a claim coupled with threatened proceedings and an absolute unconditional notice of action. That case, and the group which follows it, shows that there may be letters which in one sense may be said to be notice of intended action, but nevertheless will not count for such notice for the purposes of a statute of this sort. It is difficult to draw a distinction between the words in *Lewis* v. *Smith* [1] and those in the present case. In *Norris* v. *Smith*,[2] in which *Lewis* v. *Smith* [3] was referred to, it was held that the notice in question there was not such as the section contemplated. That case, read together with *Lewis* v. *Smith*,[3] justifies the submission that there is a distinction to be drawn where letters, speaking quite generally, make a complaint, coupled with a threat of legal proceedings if satisfaction is not made, and which in one sense are letters of notice of intended action, but

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[1] (1815) Holt N.P. 27.

[2] (1839) 10 A. & E. 188.

[3] Holt N.P. 27.

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nevertheless may not be such notice as the statute contemplates. It is conceded that it is difficult to know in *Mason* v. *Birkenhead Improvement Commissioners*[4] whether the court was more impressed with the argument that the notice lacked sufficient particularity or by its conditional nature. It is a fair inference from the above-cited authorities that a notice will not be good if it is reasonable for the recipient of it to think that something else is going to come later before the issue of the writ.

The words "notice of an intended action" are somewhat vague and ambiguous, and it is to some extent a question of degree whether any given letter is a notice of an intended action. In considering whether it is or not, one of the key questions is whether the recipient of it would reasonably expect, having received the letter, to have either some further intimation before action or a copy of the writ if the action had started—and in considering that, it is relevant for the court to take into account how the recipient dealt with the letter and what sort of an answer he gave. In *Lewis* v. *Smith*[5] and in *Norris* v. *Smith*[6] the terms of the reply were certainly taken into account. If the reply is an unqualified repudiation of liability by the insurance company, then, of course, they would be in a difficulty. The letter of May 21, 1946, whether taken alone or with the appellant's reply, does not constitute a sufficient compliance with the section in the light of the English cases. [Reference was also made to *Dulfa Umma* v. *Urban District Council, Matale*.[7]]

If reliance is to be placed on the first notice received as a notice of action—as in this case—then it must be completely unqualified. The last paragraph in the letter of May 21, 1946, makes the notice a conditional one. It is not unreasonable here to think that the insurance company thought that if an action was going to be brought they would have further notice of it or a copy of the writ. That letter was the first and only communication and was not a sufficient compliance with section 134.

Stephen Chapman for the respondent. This Ceylon legislation is obviously on the face of it a taking over of the English legislation on this matter more or less complete and intact, and the Board's decision will be just as important in this country as it will be in Ceylon. It is plain that the Ceylon draftsman has taken the composite English code contained in the Third Parties (Rights against Insurers) Act, 1930, and in the Road Traffic Acts of 1930 and 1934, and has reproduced them more or less word for word, and it is submitted that all that the notice provisions in section 10 of the English Act of 1934 and in section 134 of the Ordinance are dealing with is the laying of the foundation for the insurance company's right to bring an action for a declaration of non-liability—in the case of the Ordinance, under sections 136 and 137. The provision as to notice has nothing to do with the question of enabling an insurance company to take over the defence of the action against the assured brought by the injured party. It is in relation to these declaration proceedings and to that alone that this requirement as to notice is put in. If that is right, the sort of notice which is required is such a notice as gives the insurance company in a business sense the opportunity of exercising the remedy for the purposes of which the right to receive notice is given. That also disposes of the submission for the appellants in relation to the necessity for mentioning the court. Further, if it had been intended that the court in which the proceedings were to take place should be specified, it would have been easy to say so.

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[4] (1860) 6 H. & N. 72.

[5] Holt N.P. 27.

[6] 10 A. & E. 188.

[7] (1939) 40 C.N.L.R. 474.

No objection whatever can be made to the letter of May 21, 1946, as a compliance with section 134 of the Ordinance. It is the plainest possible intimation that the action was going to be started. Even if the letter means that an action will be started unless the claim is settled, there is nothing invalid or doubtful or ambiguous about the letter; that qualification does not prevent the letter from being a plain intimation to the appellants that the action is going to be started. The fact that something may come along which will put an end to the matter cannot prevent that document from being a good notice of action. Once the appellants had replied and said, in effect, " do not worry us," from then on they would not expect to hear anything more—to receive any further intimation. By their reply they plainly treated it as a good notice. The Supreme Court of Ceylon were right in saying that in its context in this legislation nothing formal or complicated was required by way of notice. It would have been easy to provide for any special formality.

The authorities do not really assist this matter very much. They all tend to go partly on the special language of the Act of Parliament then in question, and partly, of course, on the particular language which was used in the various documents in those cases. There is none which is really on all fours with the present case. *Lewis* v. *Smith*[8] is not against this respondent.

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[8] Holt N.P. 27.

Herbert v. *Railway Passenger Insurance Co.*[9] shows that nothing particularly formal is required in the way of notice. The letter of May 21, 1946, was a valid compliance with the requirements of section 134 of the Ordinance.

Geoffrey Cross Q.C., in reply. The argument for the respondent that the only object of section 134 is to enable the insurance company, if so minded, to start proceedings for a declaration under sections 136 and 137 of the Ordinance is not well founded; that is not the only reason for the insertion of section 134. The matter really resolves itself into a question of construction of the letter—it is a question of degree. A letter in that form is a conditional notice and is not a notice under this section.

July 21. The judgment of their Lordships was delivered by Mr. L. M. D. DE SILVA, who stated the facts set out above and continued: It will be seen that no sum is payable by the appellant unless the respondent has given the notice of action provided for by section 134. The only ground on which the appellant seeks to avoid liability is that notice under the section has not been duly given. Sections 136 and 137 of the Ordinance enable the insurer to obtain a declaration of non-liability on certain grounds in legal proceedings instituted for the purpose, provided that they are instituted before the expiration of a specified period and provided, in certain circumstances, that notice is given of the proceedings by the insurer to the injured party within a prescribed time. Their Lordships are of the opinion that one of the objects, but not the sole object, of the notice of action required by section 134 is to enable the insurer to institute within time proceedings under sections 136 and 137.

The only question for decision by their Lordships is whether the letter of May 21, 1946, is a sufficient notice of action under section 134 of the Ordinance. The Motor Car Ordinance, No. 45 of 1938, follows to a large extent the English legislation on the subject of the liability of an insurer to a third party. Section 134 (*a*) bears a resemblance to section 10 (2) (*a*) of the English Road Traffic Act, 1934, which reads: "No sum shall be payable by an "insurer under the foregoing provisions of this section—(*a*) in "respect of any judgment, unless before or within seven days "after the commencement of the proceedings in which the judg-"ment was given, the insurer had notice of the bringing of the "proceedings."

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[9] [1938] 1 All E.R. 650, 653.

In *Weldrick* v. *Essex & Suffolk Equitable Insurance Society Ld.*[1] the question arose whether a notice in the following terms was a sufficient compliance with its provisions: " We understand " your Society has repudiated liability, and we shall be grateful " to have your confirmation thereof in writing, because you will " appreciate, we shall have to take proceedings as against " Mohamed, and as against the owner of the other vehicle, and " at the same time give notice to the Motor Insurers Bureau of " your repudiation of liability." It was held that it was not. But their Lordships are of the view that that decision does not help the appellant. They agree with the District Judge " that " the main purport of this letter [in the *Weldrick* case [1]] was to " obtain confirmation of an alleged repudiation of liability," and that it was not possible to say that it was a proper notice complying with the provisions of section 10 (2) (*a*) of the Road Traffic Act.

Other English cases have been cited to their Lordships which are distinguishable from the present case on a variety of grounds. They involve the interpretation of the words " notice of action " in various statutes, and their Lordships would observe about them generally that the interpretation of such a set of words in a particular statute does not always greatly assist the interpretation of the same words in another. Their Lordships think it necessary to refer to only one of these cases, namely, *Lewis* v. *Smith.*[2] In that case an Act of Parliament incorporating the West India Dock Company was under consideration. It enacted that no action could be brought against the company unless 14 days' notice of such action had been given. A letter on which the plaintiff in that case relied as giving notice bears in some respects a resemblance to the letter under consideration by their Lordships, but was thought by Gibbs C.J. to leave " it open to conjecture " what legal proceedings were in contemplation of the plaintiff, " and against whom they were to be brought." [3] He held that the letter under consideration in that case was not a proper notice of action under the Act. The letter sent by the respondent to the appellant, however, in the present case said that the proceedings were to be for the recovery of damages and that they were to be brought against Perera, the owner of the car. It was consequently free from the defects referred to by Gibbs C.J.

It has been argued that the letter which is challenged should have contained the name of the court in which it was proposed to file action. An action cannot be specified with precision without reference to its number and to the name of the court in which it is filed. It is to be noticed, however, that section 134 contemplates the possibility of giving notice before the action is filed. In that event no number could be given. It follows that the section contemplates something containing less than a precise specification of the action. The name of the court could no doubt be given, but their Lordships do not think that the section requires that this should be done. It does not do so expressly, and there is nothing from which it can be said to do so by implication. Then it was said that the words " unless our client's claim is settled " reduced the notice to one which was conditional and insufficient for the purposes of section 134. Their Lordships agree with the view of the Supreme Court that the words must be taken to mean " settled by you," namely, by the appellant company. But they are of opinion that even if they meant " settled by you or someone " else " the words do not vitiate the notice. A notice of action without such words necessarily carries with it the implication that action will be filed only if the claim is not settled, and the addition of the express statement does not alter its meaning or its effect.

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[1] (1949) 83 Ll.L.Rep. 91, 102.

[2] Holt N.P. 27.

[3] Ibid. 29.

The notice which has been sent in this case sets out the name and address of the proposed plaintiff, the name of the owner and number of the car which caused injuries, the date of the accident and the sum which was being claimed from the owner as damages. Their Lordships are of the opinion that these elements taken together constitute a sufficient notice of action under section 134, and that there are no elements in it which in any way reduce it to something less than a sufficient notice.

For these reasons their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants will pay the respondent's costs of appeal.

Solicitors: *Smiles & Co.; Darley, Cumberland & Co.*

J. C.*

1953
July 6.

ATTORNEY-GENERAL FOR SASKATCHEWAN . . . . APPELLANT;

AND

CANADIAN PACIFIC RAILWAY COMPANY RESPONDENT;

AND

ATTORNEY-GENERAL FOR MANITOBA AND OTHERS . . . . INTERVENERS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada (Saskatchewan)—Business tax—Canadian Pacific Railway—Construction contract—Exemption of property from taxation—Implementing legislation—Constitutional validity—British North America Act, 1867 (30 *&* 31 *Vict. c.* 3), *s.* 92 (2)—*British North America Act,* 1871 (34 *&* 35 *Vict. c.* 28), *s.* 2—*Saskatchewan Act,* 1905 (*S.C.*) (4 *&* 5 *Edw.* 7, *c.* 42), *s.* 24—*City Act,* 1947 (*S.S.*) (11 *Geo.* 6, *c.* 43, *as amended*).

By clause 16 of a contract, executed on October 21, 1880, between the Canadian Government and the contractors (who were to constitute the Canadian Pacific Railway Company), providing for the construction, operation and maintenance of the Canadian Pacific Railway, the contract being scheduled to and approved and ratified by an Act of the Canadian Parliament of 1881 under which the Canadian Pacific Railway Company was created, it was provided, inter alia, that "the Canadian Pacific Railway, and all stations "and station grounds, workshops, buildings, yards and other "property, rolling stock and appurtenances required and used for "the construction and working thereof, and the capital stock of "the company, shall be forever free from taxation by the Dominion, "or by any province hereafter to be established, or by any municipal "corporation therein; . . ."

In 1905 the Province of Saskatchewan, which was carved out of Rupert's Land and the North-West Territories, which had become part of Canada in 1868, was established by the Saskatchewan Act, 1905, of the Dominion Parliament, passed pursuant to the powers conferred by the British North America Act, 1871, which, by section 2, empowered the Parliament of Canada when establishing new provinces to make provision, inter alia, "for the passing of "laws for the peace, order, and good government of such province." In purported compliance with its obligations under clause 16 of the contract of 1880, the Dominion Parliament provided in section 24 of the Saskatchewan Act of 1905 that "the powers hereby granted to "the said Province shall be exercised subject to the provisions of "section 16 of the contract."

The question having been raised whether the Canadian Pacific Railway Company was, by virtue of clause 16 of the contract and section 24 of the Act of 1905, free from the "business tax" imposed by the City Act, 1947, of Saskatchewan—assessed at a rate per square foot of the floor space of each building used for the purposes of its business in the Province—it was contended by the Province, first, that the authority granted to the Dominion Parliament by section 2 of the British North America Act, 1871, to make provision "for the passing of laws for the peace, order, and good government "of" the Province, was limited to the granting to the Province of the identical taxing powers conferred on the original four Provinces of Canada by section 92 (2) of the British North America Act, 1867—which provided that the provincial legislatures had exclusive power to make laws in relation to "direct taxation within "the Province in order to the raising of a revenue for Provincial "purposes"—and that no fetter on the power of taxation by Saskatchewan was permitted. It was contended, secondly, that the business tax was imposed on persons and companies carrying on a business, and not upon their property or upon their ownership or user of property:—

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* *Present*: VISCOUNT SIMON, LORD OAKSEY, LORD TUCKER, LORD ASQUITH OF BISHOPSTONE, and LORD COHEN.

Held, first, that the words "peace, order, and good government" in section 2 of the Act of 1871 were of very wide import, and that a legislature empowered to pass laws for such purposes had a very wide discretion. There was no set pattern of "a Province" in the Act of 1867, and a Dominion Act constituting a new Province might depart from the strict 1867 pattern, and might prescribe what laws could be passed by the Province, and accordingly section 24 of the Saskatchewan Act of 1905 imposing the limitation that the powers of the Province should be exercised subject to the provisions of clause 16 of the contract of 1880 was validly enacted.

Reference re Constitutional Validity of Section 17 *of the Alberta Act* [1927] S.C.R. 364 approved.

Held, secondly, that the business tax was imposed on the owner of things which he was using in his business, and that the exemption in clause 16 of the contract operated to relieve the railway company from the tax. Where, as here, the measure of the tax was the extent of the taxpayer's property used in his business, and that property when so used was "forever free from taxation," the tax so measured could not be regarded as something lying outside the exemption.

City of Halifax v. *Fairbanks' Estate* [1928] A.C. 117; 44 T.L.R. 5 considered.

Judgment of the Supreme Court of Canada [1951] S.C.R. 190 affirmed.

APPEAL (No. 21 of 1952), by special leave, from a judgment of the Supreme Court of Canada (November 20, 1950) allowing in part an appeal by the present respondent from a judgment of the Court of Appeal for Saskatchewan (January 29, 1949).

The following introductory statement is taken substantially from the judgment of the Judicial Committee: The Court of Appeal had before it four questions referred to it by an order of

J. C.
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the Lieutenant-Governor in Council, dated November 16, 1948, pursuant to the Constitutional Questions Act (chapter 72 of the Revised Statutes of Saskatchewan, 1940). Those questions involved consideration of the interpretation of clause 16 of a contract executed on October 21, 1880, between the Canadian Government and contractors who were to constitute the Canadian Pacific Railway Company. The contract provided for the construction, operation and maintenance of the Canadian Pacific Railway.

The respondent company was created under the authority of a statute of Canada enacted in 1881 (44 Vict. c. 1), to which the contract was scheduled, and section 1 of the statute approved and ratified the contract.

Clause 16 of the contract was as follows: "The Canadian "Pacific Railway, and all stations and station grounds, work-"shops, buildings, yards and other property, rolling stock and "appurtenances required and used for the construction and "working thereof, and the capital stock of the company, shall be "forever free from taxation by the Dominion, or by any Province "hereafter to be established, or by any municipal corporation "therein; and the lands of the company, in the North-West "Territories, until they are either sold or occupied, shall also be "free from such taxation for 20 years after the grant thereof "from the Crown."

The Province of Saskatchewan was established in 1905 by the Saskatchewan Act of the Dominion Parliament (4 & 5 Edw. 7, c. 42), passed pursuant to section 2 of the British North America Act, 1871, which provided: "The Parliament of Canada may "from time to time establish new Provinces in any territories "forming for the time being part of the Dominion of Canada, "but not included in any Province thereof, and may, at the time "of such establishment, make provision for the constitution and "administration of any such Province, and for the passing of laws "for the peace, order, and good government of such Provinces, "and for its representation in the said Parliament." Section 24 of the Act of 1905 read as follows: "The powers hereby granted "to the said Province shall be exercised subject to the provi-"sions of section 16 of the contract set forth in the schedule to "chapter 1 of the Statutes of 1881, being an Act respecting the "Canadian Pacific Railway Company."

The Order in Council granting special leave to appeal to the Privy Council limited the appeal to the following questions: "(a) As to the validity of the limitation on the powers of the

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" Province contained in section 24 of the Saskatchewan Act, " 1905; and (b) whether the exemption granted in clause 16 of " the contract covers the form of local taxation known as ' business tax ' [imposed by the City Act, 1947, of Saskatchewan]."

The Court of Appeal for Saskatchewan (Martin C.J., MacDonald and Procter JJ.) answered the questions referred to it in favour of the present appellant. Their decision was reversed in part by a majority decision of the Supreme Court of Canada (Rinfret C.J., Kerwin, Taschereau, Kellock, Estey, Locke and Cartwright JJ.).

1953. May 4, 5, 6, 7, 11, 12 and 13. *E. C. Leslie Q.C.*, *R. S. Meldrum Q.C.* and *P. G. Makaroff* (all of the Canadian Bar) for the appellant. The first submission—on a constitutional question which was not argued in the Supreme Court—is that when, pursuant to the powers conferred by section 2 of the British North America Act, 1871, the Dominion Parliament enacted the Saskatchewan Act of 1905 setting up the Province of Saskatchewan, they had no power to impose a constitutional limitation upon the right to taxation which is ordinarily possessed by the Canadian Provinces under section 92 of the British North America Act, 1867. The appellant has to satisfy the Board that section 24 of the Act of 1905 was ultra vires the Dominion Parliament. In the *Reference re Constitutional Validity of Section* 17 *of the Alberta Act* [1] the Supreme Court of Canada expressed the opinion that the Act of 1871, by section 2, authorized the Parliament of Canada to vary the provisions of the British North America Act, 1867, in so far as any new Province was concerned. Newcombe J., in giving the judgment of the court, said that section 2 of the Act of 1871 gave the Dominion Parliament the widest powers with respect to defining the powers of the new Province, and he stated that [2]: " It would be strange indeed if, when the new Provinces " emerged, constitutional guarantees could not be afforded by a " law-making body which had the powers of the Imperial Parlia-" ment to legislate for their constitution and administration, and " to define their powers to pass laws for their peace, order and " good government. . . . It is, I think, as impossible as it is " inexpedient to cast any doubt upon the generality and compre-" hensive nature of constitutional powers conferred for peace, " order and good government, and I do not find, either in the " British North America Act, of 1867 or of 1871, anything

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[1] [1927] S.C.R. 364.

[2] Ibid. 373.

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"expressed or implied which limited the power of the Parliament "of Canada in 1905 to define the constitution and powers of the "Provinces which were at that time established." The appellant does not question the result which was reached in that case, but rejects as incorrect the reasoning by which that result was supported.

The Dominion Parliament did not have the right to impose that constitutional fetter on the Province in passing section 24 of the Act of 1905. Section 146 of the British North America Act, 1867, provides for the admission of other Provinces and Rupert's Land subject to the provisions of that Act, and the Rupert's Land Act, 1868, provided for Rupert's Land being admitted under section 146. Section 3 of the British North America Act, 1886, expressly provides that: "This Act and "the British North America Act, 1867, and the British North "America Act, 1871, shall be construed together . . ." When new Provinces were established, they could only be established subject to the provisions of the British North America Act, 1867, and the provisions for the distribution of legislative power as between the Dominion and the Provinces contained in sections 91, 92, 93 and 95 of that Act would apply to any new Province. The position of a new Province was the same as that of the original Province unless it was altered in express terms. Section 24 of the Saskatchewan Act, 1905, is inconsistent with heads 2 and 8 of section 92 of the Act of 1867, under which the Province was given exclusive legislative power in relation respectively to "direct "taxation within the Province in order to the raising of a revenue "for provincial purposes" and "municipal institutions in the "Province," and is therefore ultra vires. The reasoning in the *Alberta Reference* case [1] was wrong for the reason that it would be at least extremely unlikely that one or more Provinces of Canada should have different legislative powers than the others. There is no decision in point here, but reference may be made to *In re The Initiative and Referendum Act.*[3] Saskatchewan is entitled to the same legislative powers as any other Province. The Dominion Parliament had no power to vary the provisions of the British North America Act, 1867, by inserting section 24 into the Act of 1905.

It is a fallacy to treat the word "constitution" in section 2 of the Act of 1871 as including the distribution of legislative powers between the Provinces and the Dominion. "Constitution" as used in section 2 means only the setting up of the Province and the form of government which it will have or, rather, the instruments—such as the Lieutenant-Governor, the Legislative Assembly and the Executive Council—by which the administration of the new Province can be carried on. It is in the latter sense that the word is used in the British North America Act, 1867, and as that Act is to be construed with the Act of 1871 by the express provision in the Act of 1886, " constitution " must be given the meaning given to it in the Act of 1867. [Reference was made to *In re Transfer of Natural Resources to Saskatchewan.*[4]]

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[1] [1927] S.C.R. 364.

[3] [1919] A.C. 935, 941.

Section 4 of the Act of 1871 did not authorize the Dominion to enter into a contract with the Canadian Pacific Railway providing for a tax exemption to be binding on future Provinces and municipalities therein. Once a Province is established, then so far as the distribution of legislative powers is concerned it receives the same powers as the other Provinces, and there is no power in the Dominion Parliament to place a fetter on the powers under section 92 or any other power. Under the decision in the *Alberta Reference* case,[5] not only could the Dominion in setting up the new Province subtract from it powers which the Province would ordinarily have under section 92 of the Act of 1867 but it could give to it powers which were assigned by that Act to the Dominion under section 91, and if that were done there would be a legitimate cause for complaint on the part of the other Provinces. That is a factor indicating that the construction for which the appellant contends should be given to the Act. Lastly, on this constitutional point, the respondents say that whether or not the Act of 1905 could have been validly passed under section 2 of the Act of 1871, it was prospectively ratified by the British North America Act, 1886. It is submitted that the Act of 1886 is controlled by its context, and should be read bearing in mind its purpose: Maxwell on Interpretation of Statutes, 9th ed., p. 46; Craies on Statute Law, 5th ed., pp. 41, 182–4.

Summarizing the argument on the constitutional point: (1) The British North America Act, 1867, provided for a confederation of the Provinces with equal legislative powers. (2) The original union was not conceived of as one limited to the original Provinces. Section 146 of the Act of 1867 shows clearly that it was the intention that the Dominion should grow and that new Provinces should be added to it, but each having the same legislative powers.

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[4] [1932] A.C. 28, 39; 48 T.L.R. 24.

[5] [1927] S.C.R. 364.

There is no suggestion in the Act of 1871 that the new Provinces were to have different legislative powers from the other Provinces. (3) The Act of 1871 is in pari materia with the Act of 1867 and must be construed with it, and that would be true even apart from the express provisions of section 3 of the Act of 1886. (4) The exemption provided in clause 16 of the contract was ultra vires ab initio and could not therefore be made binding on Saskatchewan by section 24 of the Act of 1905.

If the appellant is right on the constitutional question the point of construction on the applicability of the business tax provisions will not arise. Under the City Act, 1947, the basis of the business tax is a certain rate on an assessment at so much per square foot of the premises used. The profits of the business are not taken into consideration in assessing to business tax. All the same businesses are assessed at the same rate in all parts of the city. *City of Moose Jaw* v. *British American Oil Co. Ld.*[6] deals with the distinction between a tax in rem and a tax in personam. The majority judgments in the Supreme Court held that this business tax is a tax on the use or occupation of property, and therefore comes within the exemption in clause 16. It is submitted that in substance it is not a tax on the use or occupation of property, but is a tax imposed on a person carrying on business in a municipality in respect of his carrying on business, and that the basis of the assessment, that is, the area of the building which he uses, is a measure or yardstick of the business tax. Where a professional man, for example, gave up practice but remained in occupation of the same premises, the business tax would be payable only while he was in business; also a trespasser, or other person without any interest in the property at all, would be liable for the business tax if he was using the premises for business purposes. The respondents relied below on *City of Halifax* v. *Fairbanks' Estate.*[7] That case, however, does not carry one very far on the question whether this business tax is a tax on property or not. The real question in that case was whether the tax was direct or indirect; there is no doubt that it was a tax on property.

Even assuming that a business tax is a tax on "property," it is not the kind of property which is exempted from taxation by clause 16 of the contract. The exemption in that clause is limited to tax on the right of way, station grounds and rolling stock on the main line, and the capital stock of the company. If it had been intended to exempt the company from taxation such as income tax and business tax it would have been a simple matter expressly to have provided for such exemptions: *Canadian Northern Pacific Railway* v. *New Westminster Corporation.*[8] In no circumstances can clause 16 be extended to include a business tax.

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[6] [1937] 2 W.W.R. 309, 313–4.

[7] [1928] A.C. 117; 44 T.L.R. 5.

E. C. Leslie Q.C. I also appear for the Attorney-General for the Province of Alberta, intervener, who adopts and supports the case for the Attorney-General for Saskatchewan and submits that this appeal should be allowed.

Viscount Hailsham Q.C. for the Attorney-General for Manitoba, intervener, who supported in substance the case for the appellant. Considering first the constitutional point, unless section 24 of the Act of 1905 can be justified under the Act of 1871 or by so-called anticipatory validation by the Act of 1886, then the fetter imposed by section 24 must fall to the ground, for the reason that the Dominion Parliament may have the right under the Act of 1867 to create new Provinces, but if it did, then the Provinces so created could only be created under section 146, and any creation by virtue of that section would have to be subject to the Act of 1867, and, amongst other things, to section 92 (2), which assigns direct taxation within the Province as a matter exclusively within the sphere of the provincial legislature. Therefore the question which arises can be put in the form of two questions: (1) Can the fetter imposed by section 24 be justified under the Act of 1871; and (2), if not, can it be validated under the Act of 1886?

The purpose of the Act of 1871 was the establishment of Provinces and provision for their representation in Parliament. There is nothing in the power entitling the Dominion Parliament to establish a new Province to permit anything of the kind which is done by section 24 of the Act of 1905. What Parliament is entitled to establish is a Province, and "province" means an entity having the rights, jurisdiction, liabilities and duties of a Province under the Act of 1867. It cannot be within the power of the Dominion Parliament to withhold from a new Province the power to impose direct taxation. Unless the fetter imposed by section 24 of the Act of 1905 can be brought within "constitution" or "administration" or "passing of laws for the peace, "order, and good government" in section 2 of the Act of 1871, it cannot be imposed at all; there is no other compartment for it to fit into.

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[8] [1917] A.C. 602, 605.

The natural meaning of "constitution" is the constitutional organs of the Province—Lieutenant-Governor, Upper and Lower Houses, etc. The constitution of the Province established by the Dominion Parliament is capable thereafter of amendment by the provincial legislature under section 92 of the Act of 1867, except as regards the office of the Lieutenant-Governor. "Constitution" does not entitle the Dominion to impose a fetter which could not be removed by the Province. Similarly, there is nothing in the "administration" of the Province which is not in fact within the jurisdiction of the Province after it is established.

With regard to the "passing of laws for the peace, order, "and good government"; in relation to matters which are to be within the exclusive jurisdiction of the Province once it is established, all that the Dominion needs to do is to set up the necessary machinery, and it has then made provision for the passing of laws for the peace, order, etc., in one particular. But there will be a number of other subjects, which are admittedly not within the jurisdiction of the Province, in respect of which the Dominion has itself to make laws under section 91 of the Act of 1867 so far as may be necessary at the time of the creation of the Province. But the Dominion may not legislate after the creation of the Province for things which are exclusively within the power of the Province. The expression "peace, order, and "good government" covers the totality of the legislation for the area. The fetter in section 24 is ultra vires. In any case the imposition of such a fetter required the concurrence of the Imperial Parliament, and that was so even as late as the Alberta Resources Act of 1930. The machinery then employed by the British North America Act, 1930, consisted in the confirmation of various agreements, and in the case of Alberta and Saskatchewan an express clause was inserted fettering the use which the Province could make of the transferred resources in such a way that they had to follow, in cases where the legislation would otherwise be within the exclusive jurisdiction of the Province, the terms of any contract which had been made by the Dominion before the transfer. Also, the Imperial Act of 1939 (12, 13 & 14 Geo. 6, c. 81), which introduced amendments of the British North America Act, 1867, shows that even after the Statute of Westminster that was done in a way which makes it plain that the Dominion Parliament is not given power to abridge the exclusive jurisdiction of the Province under section 92 of the Act of 1867, and they do not possess that right even to this day.

If it be right that at the time of the creation of the Province it was intended that it should be lawful for the Dominion Parliament to impose any fetter it liked irrevocably, it could have been clearly expressed. If the Imperial Parliament had said so in terms, that would have been an end of the matter. The words "peace, order, and good government" do not entitle the Parliament of Canada to redistribute the legislative functions between Canada and the Provinces. It all comes back to the construction of section 2 of the Act of 1871. The words in section 24 of the Act of 1905 which purport to impose a fetter on the provincial legislature as to what it can do and the way in which it can do it are not such as fetter that Parliament in 1948 in imposing a tax which ex hypothesi is in contravention of clause 16 of the contract. Section 2 of the Act of 1871 only carries out the purpose of the Act as defined in the preamble, and the words "pass laws for "the peace, order, and good government" ought not to be read as going outside the original purposes at all. What is contemplated by that phrase is the activities of a future provincial legislature established under the section. The words have to be construed with relation to the objects actually nominated in the phrase, and that clearly would not extend extraterritorially. The words are apt to give the widest legislative authority, but limited to the territory: the *Alberta Reference* case [9]; *Riel* v. *The Queen* [10]; *Croft* v. *Dunphy*.[11] There is something repugnant in saying that the Province shall have the powers given by section 92 of the Act of 1867, but that it shall only exercise them in a particular way. There is a discussion of the meaning of the words "for the peace, "order," etc., in Constitutional Laws of the Commonwealth, by Jennings and Young (1952), pp. 46–8, where a number of authorities are set out: *The Queen* v. *Burah* [12]; *Hodge* v. *The Queen* [13]; *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick*.[14] *The Queen* v. *Burah* [15] only says that Parliament has the power to confer the widest possible powers on a subordinate legislature. From *Hodge* v. *The Queen* [16] it would appear that the Dominion can never impose a fetter on the manner in which a Province, once created, is to exercise its exclusive jurisdiction.

On the second point—the construction of clause 16 of the contract—the words to be construed are "forever free from

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[9] [1927] S.C.R. 364, 371.

[10] (1885) 10 App.Cas. 675, 678.

[11] [1933] A.C. 156; 48 T.L.R. 652.

[12] (1878) 3 App.Cas. 889.

[13] (1883) 9 App.Cas. 117, 131–2.

[14] [1892] A.C. 437, 441–3; 8 T.L.R. 677.

[15] 3 App.Cas. 889.

[16] 9 App.Cas. 117.

"taxation." The submission, basically, is that the property is free from taxation when there is no tax imposed on the owner—the legal owner—as owner of the property. It is the property which is or is not to be free from taxation. There is a line of cases in respect of the exemption under section 125 of the British North America Act, 1867, from which it is sought to draw an analogy. In *Smith* v. *Vermillion Hills Rural Council*,[17] *City of Montreal* v. *Attorney-General for Canada*[18] and *Bennett & White (Calgary) Ld.* v. *Municipal District of Sugar City No. 5*[19] a tax on the land for the purposes of that exemption was limited in the strictest possible sense to a tax on the ownership of land, and not a tax on some interest which was smaller than the full ownership of the land. Applying that to the present case, when the area is made the basis of the business tax, it is only the yardstick of a tax which is quite different from a tax on the land. See also *City of Halifax* v. *Fairbanks' Estate*.[20] Another analogy is from English law: if this immunity in clause 16 had been conferred by an English Act it would not have conferred immunity from Sch. A income tax. The business tax is not a tax on property; the standard by which it is measured is no more than a yardstick by which the tax is established. *London County Council* v. *Attorney-General*[21] is the locus classicus on this matter, and is a strong authority for the proposition that an English Sch. A income tax, notwithstanding that it is directly charged on the annual value of the land, is not a tax on property, but a tax on something quite different—a tax on income. Admittedly, a business tax is not a tax on income; it is a tax on businesses; but neither it nor the Sch. A tax is a tax on land.

What has to be considered for the purpose of determining whether the business tax comes within the terms of the exemption or not is not the method of measure but the nature of the tax itself, and if it is a tax on the business and not on the property, then the property is free from tax. There is nothing in the clause to exempt from anything else but property tax. The correct approach to the construction of clause 16 is that "as taxation is "the rule and exemption the exception, the intention to make "an exemption ought to be expressed in clear and unambiguous "terms": *Rex* v. *School District No. 1, Parish of Madawaska*,

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[17] [1916] 2 A.C. 569, 573; 32 T.L.R. 684.

[18] [1923] A.C. 136, 141–2; 39 T.L.R. 17.

[19] [1951] A.C. 786.

[20] [1928] A.C. 117; 44 T.L.R. 5.

[21] [1901] A.C. 26, 35; 17 T.L.R. 131.

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Edmundston.[22] If the Canadian Pacific Railway Company claim to be exempt from provincial or municipal taxes which other people have to pay, they must show clearly words entitling them to be so: *Fry* v. *Salisbury House Estate Ld.*[23]

C. F. H. Carson Q.C. (of the Canadian Bar), *Gahan Q.C.* and *Allan Findlay* (of the Canadian Bar) for the respondent, the Canadian Pacific Railway Company. On the constitutional issue the important words for construction are "and may . . . make "provision . . . for the passing of laws for the peace, order, and "good government of such Provinces" in section 2 of the Act of 1871. There are two conflicting contentions. The appellant submits that those words enable the Parliament of Canada to do one thing, and one thing only, and that is to provide for the machinery for the local legislature to work, and that the Dominion Parliament has no power whatever to make provision for what laws were to be passed by such Province. The respondent's contention is that the power given to the Dominion Parliament to make provision for the passing of laws for the peace, order, and good government of the newly established Province is the same power which the Imperial Parliament itself exercised under sections 91 and 92 and a large number of other sections in the Act of 1867 making provision for the passing of laws by the Parliament of Canada. By sections 91 and 92 and later sections the Imperial Parliament had the totality of laws and made provision for which laws were to be passed by the Parliament of Canada and which were to be passed by the four Provinces when established.

By section 2 of the Act of 1871 the Imperial Parliament gave to the Dominion Parliament power to make similar provisions in the case of new Provinces, that is to say, to take the totality of laws and make provision for which laws were to be passed by the Parliament of Canada and which by the legislature of the newly established Province. If Parliament is not permitted to dispute the legislative power, the totality of the laws must be committed to the new Province. The words "peace, order, and good govern-"ment" confer the widest power to make laws on any subject-matter: *Riel* v. *The Queen.*[24] Section 146 of the Act of 1867 is not in any way relevant to the question of the powers of the Parliament of Canada under the Act of 1871. The terms and conditions which the Queen approved under section 146 should in no way alter any provisions of the Act of 1867, which provisions only applied to the four original Provinces. Section 146 did not prevent the provisions of the Act of 1867 being adopted either with or without modification when a new Province was brought in under section 146: the *Alberta Reference* case.[25] Section 2 of the Act of 1871 conferred on the Parliament of Canada power to impose a limitation on the legislative authority of new Provinces different from the limitations that were imposed on the four original Provinces by the Act of 1867. If that is right, the Dominion Parliament clearly had power to limit the taxing power of the legislature of Saskatchewan under section 24 of the Act of 1905.

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[22] (1919) 49 D.L.R. 371, 374.

[23] [1930] A.C. 432, 441; 46 T.L.R. 336.

[24] 10 App.Cas. 675.

Further, under section 92 (10) (*a*), read with section 91 (29) of the Act of 1867, the jurisdiction in relation to railways was assigned to the Parliament of Canada. Unquestionably, that Parliament had power to enact the statute of 1881, which in terms ratified the contract containing clause 16, and accordingly the terms of the contract are of the character of railway legislation and within the competence of the Dominion Parliament. It is clear that to get the trans-continental railway under way it was essential to give concessions, including the tax exemption. Then in 1905 the Parliament of Canada enacted section 24 implementing the obligation which it had already incurred under clause 16. Under the " railway " head the Dominion could clearly legislate in relation to this railway, including in relation to taxation of it. Essentially section 24 is in relation to railways, and it was competent for the Dominion Parliament in 1905 to implement its obligation under the contract giving tax exemption by enacting section 24.

On the second issue, clearly clause 16 of the contract protects the respondent company from taxation in respect of property used for the working of the railway, which was to be, and is, the business of this company—it protects the company in respect of taxation on property used for its business. It cannot be said to be so protected if it is required to pay the taxes in question in this case. Clause 16 was a term of a contract between the Dominion and the railway company, and with that in mind, if in the following year, 1882, the Parliament of Canada had imposed a tax on the company, calling it a business tax, and providing that it was to be in respect of its business but measured by the area of the property used for business purposes, it could not be said that such a tax was not within the exemption. The obvious purpose of clause 16 was to protect the company against being burdened by taxation which might impair its ability to fulfil its obligation to run the railway efficiently for ever. It has also to be borne in mind that the tax would have to be paid irrespective of whether the company made a profit. The words "capital "stock" were inserted in clause 16 to protect the company against such a tax as was considered in *Bank of Toronto* v. *Lambe.*[26] What was said in *City of Halifax* v. *Nova Scotia Car Works Ld.*[27] regarding the sort of taxes which came within the exemption is applicable here so far as the respondent company is concerned. The exemption in clause 16 is in respect of property used in the working of the railway. As to why it is called a business tax, see *Dominion Express Co.* v. *City of Brandon.*[28] The tax here, while labelled a business tax, is essentially an occupancy tax. If it were a business tax in the strict sense one would have expected it to bear some relation to the earnings of the business, and that is not so here. Further, the tax here would include many people who are not normally regarded as carrying on business; and also it is not imposed on all persons carrying on business, but only on those persons who use property. This so-called business tax applies to business property only; and in addition the Act provides for the imposition of what is called a house-holder's tax: section 486; and that tax, like the business tax, is imposed on persons in respect of their occupation of property, but for residential purposes.

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[25] [1927] S.C.R. 364, 369.

It is clear that the parties intended the exemption in clause 16 to cover all types of taxes on or in respect of property. The exemption provisions should be construed as protecting the company not only from the types of property taxes in existence in 1881 but also from all types of property taxes which have come into existence since that time: *Associated Newspapers Ld.* v. *City of London Corporation.*[29] If, as the appellant contends, clause 16 does not exempt the company from taxes which, it is submitted, are essentially in respect of its use or occupation of property, the benefits which were intended to be conferred by clause 16 would be lost.

W. R. Jackett Q.C. (of the Canadian Bar) for the Attorney-General for Canada, intervener, arguing only on the question of the validity of section 24 of the Saskatchewan Act of 1905, supported the argument for the respondent company and submitted that section 24 was valid and operated to limit the legislative powers of the Province.

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[26] (1887) 12 App.Cas. 575; 3 T.L.R. 742.

[27] [1914] A.C. 992, 995.

[28] (1911) 17 W.L.R. 71, 75.

[29] [1916] 2 A.C. 429; 32 T.L.R. 700.

E. C. Leslie Q.C. in reply. It was said for the respondent on the constitutional point that under section 2 of the Act of 1871 the Dominion Parliament in setting up or establishing the Province of Saskatchewan could have made a redistribution of legislative powers, and in support of that argument reference was made to certain sections of the Manitoba Act, 1870, to the Orders in Council admitting Prince Edward Island and British Columbia, and to the Terms of Union between Canada and Newfoundland, and also to certain provisions of the Act of 1867 itself. It may first be observed, however, that all those Acts or Orders in Council by which the other Provinces were admitted to the Dominion after 1867 were ratified by the Imperial Parliament or by Orders in Council passed under the Imperial Parliament; and secondly, the remarkable thing is not the differences between the powers and constitutions of the various Provinces, but the similarity. There was, in fact and in substance, never any change in the distribution of legislative powers as set up in sections 91 and 92 of the Act of 1867. [Reference was made to *Rimmer* v. *Hannon*,[30] *In re Natural Resources (Saskatchewan)*[31] and *Hudson's Bay Co.* v. *Bratt's Lake Rural Municipality*.[32]] If Parliament took away from section 92 a head of legislation which under that section would be committed to the Province it would lead to a legislative vacuum. All the authorities have always referred to this division of powers between the Dominion and the Provinces without drawing any distinction between Saskatchewan and Alberta and the other Provinces.

The appellant can equally rest his case on the terms of section 3 of the Act of 1886, which was in force when the Act of 1905 was passed. *Canada Southern Railway Co.* v. *International Bridge Co.*[33] shows that the Acts of 1867 and 1871 are to be read together; and see also Halsbury's Laws of England, 2nd ed., vol. 31, p. 486, para. 611. Reading the two Acts together, the Dominion Parliament had no power to take away on the establishment of the Province of Saskatchewan any of the legislative powers entrusted to it by section 92 of the Act of 1867. [Reference was made to *Bank of Toronto* v. *Lambe*.[34]]

Finally, the business tax is not colourable legislation to defeat clause 16. It is a tax on a person carrying on a business; it is not a property tax within the meaning of the exempting clause 16, for (a) it is assessed only on those carrying on business; and (b) the business tax is in addition to a tax on land. There may be persons carrying on business who, because they do not occupy premises, would escape business tax. It was said in *Cape Brandy Syndicate* v. *Inland Revenue Commissioners*[35] that: "It is "urged . . . that in a taxing Act clear words are necessary in "order to tax the subject. Too wide and fanciful a construction "is often sought to be given to that maxim, which does not mean "that words are to be unduly restricted against the Crown, or "that there is to be any discrimination against the Crown in "those Acts." *City of Halifax* v. *Fairbanks' Estate*[36] is different from the present case.

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[30] (1921) 60 D.L.R. 637.
[31] [1932] A.C. 28, 39; 48 T.L.R. 24.
[32] [1919] A.C. 1006.
[33] (1882) 8 App.Cas. 723, 727.
[34] 12 App.Cas. 575; 3 T.L.R. 742.

July 6. The judgment of their Lordships was delivered by VISCOUNT SIMON who, after making the introductory statement set out above, continued: As to (*a*)—the first of the questions to which the appeal is limited by the Order in Council granting special leave to appeal—the appellant contends that the Parliament of Canada in passing the Saskatchewan Act, 1905, and thereby creating the new Province of Saskatchewan and including it in the Union had no power to provide that the provincial legislature, when making laws in relation to direct taxation within the Province in order to the raising of revenue for provincial purposes, or in relation to municipal institutions in the Province, should exercise those powers "subject to the provisions of "section 16 of the contract," but that the effective taxing powers of the legislature of the new Province remain as extensive as the powers conferred by section 92 (2) of the British North America Act, 1867, upon the legislature of each of the Provinces originally included in the Federation. This amounts to saying that section 24 of the Saskatchewan Act should be disregarded as being ultra vires of the Parliament of Canada.

As to (*b*), the appellant contends that if effect is to be given to section 24 and to the provisions of clause 16 of the said contract, which thus provide a certain exemption from taxation by the new Province, or by any municipal corporation therein, the result is nevertheless to leave the respondent company liable to "business tax" under the City Act, 1947, of the Province.

Their Lordships will first deal with the former of the two questions above formulated. It is obvious that, if this first question is answered in favour of the appellant, the second question becomes immaterial, for if the provincial powers of taxation possessed by the Province of Saskatchewan are as wide as those contained in section 92 without the fetter imposed by clause 16 of the contract and section 24 of the Saskatchewan Act, it is immaterial how clause 16 is construed and applied, and the business tax which has been enacted by the Saskatchewan legislature will be imposed on the respondent company in common with all other persons and enterprises carrying on business within the Province.

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[35] [1921] 1 K.B. 64, 71; 37 T.L.R. 33.

[36] [1928] A.C. 117; 44 T.L.R. 5.

This first question could only be raised on appeal to the Privy Council inasmuch as it had already been in effect decided in a sense adverse to the appellant's contention in the judgment of the Supreme Court of Canada, delivered by Newcombe J. on behalf of the court, in the *Reference re Constitutional Validity of Section* 17 *of the Alberta Act.*[1] The appellant contended before the Board that Newcombe J.'s judgment leading to this conclusion in the Alberta reference was wrong, and their Lordships were therefore invited to dissent from the view of Newcombe J. and to hold that section 24 of the Saskatchewan Act has no effect.

Although the British North America Act, 1867, provided for a federation of four Provinces only, viz., Quebec, Ontario, Nova Scotia and New Brunswick, the statesmen who were responsible for framing the Act contemplated from the beginning the enlargement of the federal area so as to include the whole of what is now Canada. To the west of the area included in the original Federation lay an immense territory stretching to the Rocky Mountains and beyond to the Pacific. The area immediately to the west (which had originally been granted to the Hudson's Bay Company by the Charter of 1670) was known as Rupert's Land and the North-West Territories, and between the Rocky Mountains and the Pacific Ocean lay the colony of British Columbia, which already had a separate legislature. Consequently, section 146 of the Act made provision for the admission into the Union of territories not at first included within the boundaries of Canada. The section provided: "It "shall be lawful for the Queen, by and with the advice of Her "Majesty's most honourable Privy Council, on addresses from "the Houses of the Parliament of Canada, and from the Houses

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[1] [1927] S.C.R. 364.

"of the respective legislatures of the Colonies or Provinces of "Newfoundland, Prince Edward Island, and British Columbia, "to admit those Colonies or Provinces, or any of them, into the "Union, and on address from the Houses of the Parliament of "Canada to admit Rupert's Land and the North-Western "Territory, or either of them, into the Union, on such terms "and conditions in each case as are in the addresses expressed "and as the Queen thinks fit to approve, subject to the provisions of this Act; and the provisions of any Order in Council "in that behalf shall have effect as if they had been enacted by "the Parliament of the United Kingdom of Great Britain and "Ireland."

British Columbia entered the Union in 1871 on the terms and conditions scheduled to the Order in Council of May 16, 1871, for British Columbia was a "settled" Colony and thus required no statutory provision to create it an additional Province of Canada. Rupert's Land and the North-West Territories had become part of Canada pursuant to the Rupert's Land Act, 1868, which authorized the surrender of the land of the Hudson's Bay Company to the Crown and which further gave power by Order in Council on address from the Houses of the Parliament of Canada to admit the surrendered territory into the Dominion of Canada.

The project of a trans-continental railway which would connect the Pacific coast with the railways in the east of Canada had long been in the minds of Canadian statesmen, and more than one effort had been made to realize the project and attract finance for such a railway. If it could be created, it would not only contribute to the development of trade, but would bind all parts of the Canadian continent together. But in order that the project should be achieved by creating a company, it was necessary to offer investors terms which would attract their support for a railway which would have to traverse immense areas of wild and thinly populated country, and would involve the carrying of its track by steep gradients over the Rocky Mountains. It was among the terms and conditions insisted upon by British Columbia for its admission into the Union that the Government of the Dominion should assume "the obligation of causing a "railway to be constructed, connecting the seaboard of British "Columbia with the railway system of Canada." (See first recital in the preamble of the Canadian Pacific Railway Act, 1881.) Clause 16 of the contract, which was ratified by that Act, was one of the inducements, and other clauses of the contract provided that the Government of the Dominion should make a grant to the company of the lands required for the road-bed and the other sites necessary for the convenient and effective construction and working of the railway, that materials of construction should be admitted free of duty, and that there should be granted to the company blocks of land on each side of the railway, which would, of course, increase in value when the railway was made and worked.

It is to be observed that section 146 of the British North America Act, which authorized the inclusion of Rupert's Land and the North-Western Territories into the Union, did not in terms authorize the creation of new Provinces out of these areas when admitted. Notwithstanding this, the Manitoba Act, 1870, of the Canadian Parliament (33 Vict. c. 3) provided for the creation and constitution of the Province of Manitoba, which was carved out of these territories as soon as they were admitted into the Union. Doubts appear to have been entertained respecting the powers of the Parliament of Canada to establish such Provinces, and consequently the United Kingdom Parliament enacted the British North America Act, 1871 (34 & 35 Vict. c. 28), which, by section 5, confirmed the Manitoba Act, and by section 2 provided as follows: "The Parliament of "Canada may from time to time establish new Provinces in any "territories forming for the time being part of the Dominion of "Canada, but not included in any Province thereof, and may, "at the time of such establishment, make provision for the "constitution and administration of any such Province, and for "the passing of laws for the peace, order, and good government "of such Province, and for its representation in the said "Parliament."

It is to be noted that the Province of Manitoba thus created was not an exact replica of the Provinces created in 1867, but the provisions of the British North America Act, 1867, so far as generally applicable to the Provinces previously composing the Dominion were to apply to the Province of Manitoba "except "so far as the same may be varied by this Act" (section 2). Examples of such variation may be found in section 22, section 23 and section 27 of the Manitoba Act.

It was under these powers conferred by the Act of 1871 that the Parliament of Canada enacted the Saskatchewan Act in 1905 and included in it section 24, which has already been set out. It will be observed that clause 16 of the contract of 1880 did not promise any exemption from taxation by the original Provinces, for they had taxing powers under section 92, which could not be cut down by the Dominion. The exemption provided for was "from taxation by the Dominion, or by any "Province hereafter to be established," and hence when the Province of Saskatchewan was carved out of Rupert's Land and the North-West Territories, section 24 was inserted by the Parliament of Canada in an effort to keep faith with the Canadian Pacific Railway Company.

The question, therefore, which their Lordships have first to decide, is whether section 24 is validly enacted.

Mr. Leslie's contention, supported with energy and ingenuity by Lord Hailsham for the intervener representing Manitoba, was that the Dominion Parliament was given no power by the Imperial Act of 1871 to limit the right of the new Province of Saskatchewan to tax under the terms of section 92. They contended that the authority which the Act of 1871 gave to the Dominion Parliament to carve out of the added territory "a "Province" was an authority to create a Province with powers identical with those of the Provinces already created by the Act of 1867, and that no fetter upon the power of taxation of the new Province was permitted. To this Mr. Carson, for the respondent railway company, replied that even in the Act of 1867 the powers of taxation conferred upon the four original Provinces were not uniform; for example, although indirect taxation was a Dominion subject (section 91 (3)), yet, by section 124, the right was conferred on the Province of New Brunswick to levy lumber dues. And other examples could be given. There was thus no set pattern of "a Province" in the Act of 1867, which was bound to be followed in creating the new Province of Saskatchewan. The development of the added territories in 1871 had not advanced so far as the development of either the old Provinces or of Manitoba, so that it may very well have been thought necessary to give the Dominion Parliament freedom of action in the creation of new Provinces, not only as to the time of their creation but also as to the extent of powers of taxation which should be conferred upon them.

Section 2 of the Act of 1871 empowers the Parliament of Canada, at the time when it establishes new Provinces in the added territories, to make provision—(*a*) For the constitution and administration of any such Province; (*b*) for the passing of laws for the peace, order, and good government of any such Province; and (*c*) for its representation in the Dominion Parliament. The words "peace, order, and good government" are words of very wide import, and a legislature empowered to pass laws for such purposes had a very wide discretion. But Mr. Leslie and Lord Hailsham emphasized the distinction between section 4 of the Act of 1871, which enabled the Parliament of Canada to provide from time to time for peace, order, and good government in territories not included in a Province, and section 2, which only enabled them to provide for the passing of laws for the peace, order, and good government of a Province at the time when it was established. Section 2, they argued, enabled the Canadian Parliament to define the machinery for the passing of laws, but not to prescribe what laws might be passed by the Province. The prescription, they contended, had been done for good and all by section 92 of the Act of 1867.

But their Lordships would observe that if this argument was well founded the words in section 2 of the Act of 1871 " for the " passing of laws for the peace, order, and good government " would be superfluous. The power to make provision for the " constitution " of the new Province would be sufficient to enable the Parliament of Canada to provide a restriction on the normal range of taxing power exercised by the provincial legislature. The words under discussion being words of general import, their Lordships do not feel justified in placing on them the narrower meaning for which the appellant and Lord Hailsham contend.

The appellant further relied on the phrase " subject to the " provisions of this Act " in section 146 of the Act of 1867 and contended that this phrase implied a structure of Provinces analogous to the original Provinces. But so far as the lands comprising Rupert's Land and the North-West Territories are concerned, section 146 was exhausted when they were admitted to the Union, as they were by the Rupert's Land Act, 1868. It appears to their Lordships that section 146 is therefore irrelevant to the issue they have to decide.

The appellant also relied on section 3 of the British North America Act, 1886, which directed that the 1867 Act and the 1871 Act should be construed together. The expression " Province," it was said, must therefore be given throughout the meaning attached to it in the Act of 1867, and this involved that every Province must have full section 92 powers. With great respect, this argument seems to involve a complete non sequitur. Every Province created or to be created must, of course, be a Province in the Dominion of Canada, but the Act of 1867 contained no such definition of Province as would involve any conflict between that Act and the 1871 Act. There is no complete equality of powers between the four original Provinces. The Manitoba Act, 1870, shows that an Act constituting a Province might depart from the strict 1867 pattern. No doubt one reason for the passing of the 1871 Act was to remove any doubt as to the validity of the Manitoba Act, but it is noteworthy that a section on the lines of section 2 of the Manitoba Act recognizing variations has been introduced into all the documents creating a Province since that date—see paragraph 10 of the schedule to the British Columbia Order in Council of May 16, 1871, the Resolution relating to Prince Edward Island scheduled to the Prince Edward Island Order in Council of June 26, 1873, section 3 of the Saskatchewan Act, 1905, section 3 of the Alberta Act, 1905, and section 3 of the Terms of the Union between Canada and Newfoundland scheduled to the British North America Act, 1949.

From the time that the North-West Territory was admitted into the Dominion, the Parliament of Canada had the widest powers of legislation under section 5 of the Rupert's Land Act, 1868. It might have caused great inconvenience if the Parliament of Canada, when carving new Provinces out of the added areas, could not make such deviation from section 92 as was necessary to make effective acts done under the powers conferred on it by section 5 of the Rupert's Land Act, 1868, and section 4 of the 1871 Act. These considerations support the conclusion of the Supreme Court in the *Alberta reference*,[1] and their Lordships are not prepared to differ from it.

Mr. Carson advanced two alternative grounds for upholding section 24 of the Saskatchewan Act, claiming (1) that it was validated by the second paragraph of section 2 of the 1886 Act; and (2) that clause 16 of the agreement when approved by the Dominion Act of 1881 was part of inter-provincial railway legislation, and therefore within Dominion competence under section 91 (29), and section 92 (10) of the Act of 1867, and that section 24, which was only included to make clause 16 effective, must also be regarded as such railway legislation within the competence of the Dominion Parliament.

Their Lordships, without pronouncing upon the validity of either of these arguments, prefer to rest their conclusion on the other grounds already stated.

There remains the question whether the language of clause 16 is such as to prohibit the imposition of " business tax " upon the respondent company. Notwithstanding that the exemption provided by the clause is conferred on the physical property there mentioned, all taxes are exacted from and paid by persons, and the question comes to be whether the respondent company, as the owner and user of the properties mentioned, is free from taxation in respect of them. Mr. Leslie and Lord Hailsham argue that the business tax imposed by the City Act, 1947, of Saskatchewan was imposed on persons and companies carrying on a business and not upon their property or upon their ownership or user of property. On this view, the provision that the liability to business tax of a taxpayer was measured by the floor-space or area which he used while carrying on his business was nothing more than a " yardstick " to ascertain the amount for which the taxpayer was liable under the tax. There are, no doubt, many instances in which it is important to distinguish between the nature of the tax imposed and the measure of the amount of tax to be paid. For example, British income tax is imposed on the income of the taxpayer in the year of charge, but the amount of tax is measured by reference to income in an earlier year. But where the measure of the tax is the extent of the taxpayer's property used in his business, and this property when so used is " forever free from taxation " the tax so measured cannot be regarded as something lying outside the exemption.

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[1] [1927] S.C.R. 364.

Their Lordships agree with the view of the majority of the Supreme Court that in the present instance the tax in question is imposed upon the owner of things which he is using in his business. As Kellock J. observed: " It would be an extra-" ordinary result if the proper interpretation of this exemption " were to be said to be that while taxes imposed upon the owner " in respect of his ownership of these things fall within the " exemption, nevertheless taxes imposed upon the owner in " respect of his use of the same items do not."

Locke J. stated the contention thus: " The position adopted " on behalf of the Province of Saskatchewan put bluntly is this: " —that while neither the physical property defined by clause 1 " nor the Canadian Pacific Railway Company in respect of its " ownership of that property is liable to taxation, so-called " business taxes may be levied upon the company in respect of " its business of operating it. While the language of clause 16 is " that the property shall be ' forever free from taxation ' by any " Province thereafter to be established, it is said that to tax the " company in respect to the *use* of the property (itself a term " of the exemption), is not to tax the property and that that " alone is prohibited."

That judge went on to observe: " Clause 16 of the contract

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"does not grant an absolute exemption of the stations, station "grounds, buildings and other property referred to, but only such "as are used for the construction and working of the railway and, "in my opinion, if buildings which fell within the description "ceased to be used by the owner or operator of the property for "such purposes the exemption would be lost. Since, therefore, "it is the buildings, station grounds, yards and other property "when used for these purposes which are declared to be forever "free from taxation by the Dominion or by any Province there-"after to be established, I think it cannot be said that a tax "upon the owner in respect of the use of the property for the "purpose of working the railway is not squarely within the "exemption. To construe the clause otherwise is to say that the "properties mentioned are exempt from all taxation *when* used "for the defined purpose, but *if* they are so used that the owner "may be taxed in respect of that use. I am unable so to con-"strue the clause."

Their Lordships agree with this construction of the clause and have reached the conclusion that the exemption operates to relieve the respondent company from the tax.

In the course of the argument the decision in *City of Halifax* v. *Fairbanks' Estate*[2] was more than once referred to. That decision contains sentences which, detached from their context, were prayed in aid to reinforce the case for the respondents. But the point at issue in that case was different, viz., whether the "business tax" there involved was a direct tax, and was moreover so complicated by provisions for treating the owner of property let to the Crown as notionally the occupier, that their Lordships prefer not to rest their conclusions on it. It is unnecessary to say more than that the case does nothing to impair or qualify those conclusions.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the costs.

Solicitors: *Lawrence Jones & Co.; Blake & Redden; Charles Russell & Co.*

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[2] [1928] A.C. 117; 44 T.L.R. 5.

J. C.*

1953
July 14.

CITY OF WINNIPEG . . . . . APPELLANT;

AND

CANADIAN PACIFIC RAILWAY COMPANY . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada (Manitoba)—Business tax—Canadian Pacific Railway Company—Charter powers—Construction—Deed of covenant to erect and maintain forever main workshops in Winnipeg — Comprehensive municipal tax exemption—Validity of deed of covenant—Exemption from business tax—Act Respecting the Canadian Pacific Railway, (S.C.) 1881 (44 *Vict. c.* 1), *s.* 2—*Letters Patent Incorporating the Canadian Pacific Railway Company, February* 16, 1881, *cl.* 4.

By clause 4 of the charter of 1881 granted to the Canadian Pacific Railway Company pursuant to section 2 of the Dominion Act of 1881 (44 Vict. c. 1), which Act approved and ratified the contract providing for the construction of the Canadian Pacific Railway, it was provided that: "All the franchises and powers "necessary or useful to the company to enable them to carry out, "perform, use, and avail themselves of, every condition, stipulation, obligation, duty, right, remedy, privilege, and advantage "agreed upon, contained or described in the said contract, are "hereby conferred upon the company. . . ."

The appellant, the City of Winnipeg, wishing to secure that the principal workshops and stockyards of the company for the Province of Manitoba should be situated in the City of Winnipeg, entered into an agreement with the company for that purpose, the agreement being evidenced by by-law No. 148 of 1881, which provided, inter alia, that in consideration of the agreement and on the company executing a bond and covenant that they would establish and build and forever continue their principal workshops and stockyards in the City of Winnipeg, all property then or thereafter to be owned by the company within the limits of that city for railway purposes or in connexion therewith should be forever free and exempt from all municipal taxes, rates and levies, and assessments of every nature and kind.

The company executed a bond and covenant in purported fulfilment of the conditions of by-law No. 148, and in due course erected and maintained the workshops and stockyards in accordance therewith. In 1948 the appellant purported to repeal by-law No. 148, and thereupon served notices assessing the lands and buildings owned by the company in the City of Winnipeg for railway purposes or in connexion therewith for realty tax and business tax. The company, basing its claim on the agreement, the terms of which were set out in by-law No. 148, claimed that

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* *Present*: VISCOUNT SIMON, LORD OAKSEY, LORD TUCKER, LORD ASQUITH OF BISHOPSTONE, and LORD COHEN.

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the property in question was exempt from all municipal taxes, and in particular property and business tax. It was contended for the appellant, inter alia, that the company, under the agreement recited in its charter of incorporation, had contracted "forever "efficiently to maintain and use the Canadian Pacific Railway," and that inasmuch as in 1881 it could not be certain that at some future period it might not be advisable to move the main workshops in Manitoba to some other place than Winnipeg, it was ultra vires the company, on the principle that a company cannot contract not to use or carry out its chartered powers, to enter into an agreement forever to maintain its main workshops in Winnipeg:—

Held, first, that the enumerated powers in the charter of incorporation of the company, and in particular those of clause 4, which appeared to be couched in the widest possible terms, empowered the company to enter into the deed of covenant of 1881, and the exemption from taxation granted to the company by by-law No. 148 was binding on the appellant. The deed of covenant did not infringe the principle relied on by the appellant. Further, the arrangement pursuant to which the deed of covenant was executed was "inci"dental to . . . those things which the legislature has authorized" within the meaning of the dictum of Lord Selborne L.C. in *Attorney-General* v. *Great Eastern Railway Co.* (1880) 5 App.Cas. 473, at 478, and "ought not . . . to be held, by judicial construc"tion, to be ultra vires," and was "useful" to the company within the meaning of clause 4 of its charter and was within its power.

Corporation of Whitby v. *Grand Trunk Railway Co.* (1901) 1 O.L.R. 480 considered.

Held, secondly, that the exemption from taxation granted relief from business tax. On the facts there was no material distinction between the exemption in this case and that in *Attorney-General for Saskatchewan* v. *Canadian Pacific Railway Co.*, ante, p. 594, in which the company were held to be exempt from the business tax there in question.

Judgment of the Supreme Court of Canada [1952] 1 S.C.R. 424 affirmed.

APPEAL (No. 22 of 1952), by special leave, from a judgment of the Supreme Court of Canada (October 22, 1951) affirming a judgment of the Court of Appeal for Manitoba (April 17, 1950) which had reversed in part a judgment of the Court of King's Bench (October 7, 1949).

The following introductory statement is taken from the judgment of the Judicial Committee. By notices given respectively in March and June, 1948, the appellant notified the respondent company that the appellant had assessed the lands and buildings owned by the respondent company in the City of Winnipeg for railway purposes or in connexion therewith for realty tax and business tax respectively. Immediately after the service of the first of such notices the respondent company commenced proceedings against the appellant, and after receipt of the second notice amended its statement of claim. By the amended document the respondent company claimed that all its property then owned or thereafter to be owned by it in the City of Winnipeg was forever exempt from all municipal taxes, rates and levies and assessments of every nature and kind, and in particular from any real property tax or business tax in respect of such property. It based its claim on an alleged agreement, the terms of which were set out in City of Winnipeg by-law No. 148, dated September 5, 1881, as amended by City of Winnipeg by-law No. 195, dated October 30, 1882.

A number of issues were raised in the action and were decided in favour of the respondent company by the trial judge (Williams C.J.) on October 7, 1949. The appellant appealed to the Court of Appeal for Manitoba, and on April 17, 1950, that court (McPherson C.J., Richards, Coyne, Dysart and Adamson JJ.) varied the judgment of the trial judge by holding, amongst other things, that the respondent company was liable for business tax.

Both parties then gave notice of appeal to the Supreme Court of Canada, the respondent company seeking a restoration of the judgment of the trial judge and the appellant seeking a reversal of that part of the order of the trial judge which had been affirmed by the Court of Appeal. On October 22, 1951, the Supreme Court (Rinfret C.J., Kerwin, Taschereau, Rand, Kellock, Estey, Locke, Cartwright and Fauteux JJ.) restored the order of the trial judge.

The appellant then applied to the Privy Council for leave to appeal, and on July 18, 1952, leave was granted, but the appeal was limited to two questions: (1) Whether a deed of covenant dated October 10, 1881 [by which the respondent company undertook, inter alia, to build and forever continue in Winnipeg their principal workshops and stockyards in Manitoba], and executed by the respondent company in pursuance of the agreement mentioned in by-law 148 was ultra vires the respondent company with the result that the exemption from taxation conferred on the respondent company by by-law 148 never became effective; and (2) whether, if perpetual exemption from taxation was conferred by the said by-law, such exemption did or did not extend to the business tax.

1953. May 13, 14, 18 and 19. *W. P. Fillmore Q.C.*, *G. F. D. Bond Q.C.* (both of the Canadian Bar) and *R. O. Wilberforce* for the appellant. In 1948 the City of Winnipeg purported to repeal

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by-law 148 and to assess the Canadian Pacific Railway Company for realty and business taxes in respect of property owned by the company in the city for railway purposes. The company then began these proceedings, alleging that they had entered into an agreement with the appellant city in 1881, the terms of which are set out in by-law 148, whereby in consideration of their undertaking to build and continue forever in the City of Winnipeg their principal workshops and stockyards in Manitoba, they were exempted forever from taxation of the property used for railway purposes within the city, and they asked for an injunction to restrain the city from levying or attempting to collect either of the taxes. The city pleaded, inter alia, that the deed of covenant entered into by the company, in pursuance of and in compliance with the terms of the by-law, to the effect that they would build and continue forever the workshops and stockyards in Winnipeg was ultra vires the company. There is nothing in the Act of incorporation of the company, in the contract providing for the construction of the railway, in the charter of the company, or in the Consolidated Railway Act, 1879, to which the charter is subject, which gives the railway company power to enter into a deed of covenant of that nature as for all time; there was therefore no bargain, the parties were never ad idem, and the covenant was not binding on the company and, therefore, not binding on the city. By an Act of the Manitoba legislature in 1883 by-law 148 was expressly declared valid, but, as was said in *Ontario Power Company of Niagara Falls* v. *Stamford Corporation* [1]: "It "is important to observe that the Act does not purport to confirm "any agreement whatever between the parties; it purports only "to legalize and make binding the by-law."

To carry out the terms of the construction contract it was not necessary for the company to contract that they would maintain a particular part of the works in a particular place for all time. The then directors could not for all time tie the hands of future boards in respect of the efficient operation of the railway, which the company were bound to carry on. Parliament intended the large grants of land and money to the company to be used for the specified purpose; they did not intend to create a common law corporation, and the company's powers are limited to those defined in its constituting documents. *Bonanza Creek Gold Mining Co.* v. *The King* [2] can be distinguished from this case, where the circumstances are entirely different. See also *Attorney-*

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[1] [1916] 1 A.C. 529, 534.

[2] [1916] 1 A.C. 566.

General v. *De Keyser's Royal Hotel.*[3] The company had no power to contract to maintain their principal workshops and stockyards in Winnipeg forever, and therefore had no power to accept the offer of the city to exempt them from taxation if they would do so. The bond and covenant of October 10, 1881, amounted to an agreement on the part of the company not to exercise its statutory powers, and is therefore ultra vires on the principle that a company cannot contract not to carry out its chartered powers. The agreement to maintain forever the workshops and stockyards for Manitoba in Winnipeg is incompatible with the duty of the company forever efficiently to operate the railway in the public interest as required by clause 7 of the contract. The question of ultra vires is not to be decided by the pecuniary result of the bargain which was struck: *York Corporation* v. *Henry Leetham & Sons Ld.*[4] The principle of construction which should be applied to the facts of this case is best illustrated by such cases as *Whitby Corporation* v. *Grand Trunk Railway Co.*[5]—a case in pari materia with the present, and the attempt made in the Supreme Court to distinguish it should fail—and *Proprietors of the Staffordshire and Worcestershire Canal Navigation* v. *Proprietors of Birmingham Canal Navigations.*[6] [Reference was also made to *Birkdale District Electric Supply Co.* v. *Southport Corporation*[7]; *Ayr Harbour Trustees* v. *Oswald*[8]; *In re Heywood's Conveyance*[9]; *Montreal Park and Island Railway Co.* v. *Chateauguay and Northern Railway Co.*[10] and *Baroness Wenlock* v. *River Dee Co.*[11]] All that the argument comes down to is that a covenant by which the company agrees that a future board of directors can never move the workshops and stockyards from Winnipeg is bad on the face of it and beyond the powers of the company.

The words "agreed upon . . . or described in the said con-"tract" in clause 4 of the charter are words of limitation; the purpose of that clause was to enable the company to construct the railway, and it confers all possible powers and authority to carry out the contract. But there is nothing in the contract, or in the charter, or in the Consolidated Railway Act of 1879, which specifically refers to workshops and stockyards, and it is submitted that clause 4 relates only to works of construction. Further, "useful" in clause 4 can only mean what is expedient from time to time, but not for all time. There was nothing agreed upon, contained or described in the contract, for example, which made it useful to agree forever to continue the principal workshops in Winnipeg. Subsequent events might have made it impracticable or even impossible and economically unsound for the workshops to be maintained in that city. The inclusion of the word "useful," with similar words in clause 4, did not invest the then directors of the company with authority forever to tie the hands of future directors so that the railway could not be operated in the most efficient manner from time to time in all the years to come.

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[3] [1920] A.C. 508, 539–40; 36 T.L.R. 600.

[4] [1924] 1 Ch. 557, 569; 40 T.L.R. 371.

[5] (1901) 1 O.L.R. 480.

[6] (1866) L.R. 1 H.L. 254, 267.

[7] [1926] A.C. 355, 371; 42 T.L.R. 303.

[8] (1883) 8 App.Cas. 623.

[9] [1938] 2 All E.R. 230, 232.

[10] (1904) 35 S.C.R. 48, 57.

[11] (1885) 10 App.Cas. 354, 362; 1 T.L.R. 477.

With regard to estoppel or ratification, the law is clear that if an agreement is ultra vires it is a nullity and cannot be made intra vires by the conduct of the parties—no authority need be cited for the proposition.

G. F. D. Bond Q.C., following on the second question—whether, if perpetual exemption from taxation is conferred by by-law 148, such exemption does or does not extend to the business tax. The appellant here has nothing to add in the way of argument to what was said by Mr. Leslie and Viscount Hailsham on the business tax point in *Attorney-General for Saskatchewan* v. *Canadian Pacific Railway Co.*,[12] but in adopting their arguments would direct attention to the differences between clause 16 of the contract and section 4 (8) of by-law 148 to indicate that the two cases are not identical and that an adverse decision in the *Saskatchewan* reference [12] does not determine this appeal against the appellant. Even if the property of the company should be held to be exempt under by-law 148, the business tax is not a tax on the property of the company used for railway purposes. There was no intention in the by-law to exempt from business tax, since that tax was not known in 1881 when the by-law was passed. The yardstick here—rental value—makes no difference; they might have adopted the same as in the *Saskatchewan* case [12]—floor area. *In re Hydro-Electric Power Commission of Ontario and City of Hamilton* [13] is directly in point, except that the yardstick is different. That case was followed in *City of Moose Jaw* v. *British American Oil Co. Ld.*[14] and in *In re Northern Saskatchewan Flying Training School Ld. and Rural Municipality of Buckland.*[15] Reliance is placed on those cases. The business tax is not a tax on property; it is not an occupancy tax, although it is based on occupancy.

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[12] Ante, 594, 601.

[13] (1920) 47 O.L.R. 155, 160–1.

[14] [1937] 2 W.W.R. 309.

[15] [1943] 3 W.W.R. 609.

C. F. H. Carson Q.C. (of the Canadian Bar), *Gahan Q.C.* and *Allan Findlay* (of the Canadian Bar), for the respondent company, were not called upon.

July 14. The judgment of their Lordships was delivered by LORD COHEN, who stated the facts set out above and continued:—To determine the issues in respect of which special leave to appeal was granted it is necessary to have in mind the circumstances in which the respondent company was incorporated and to refer briefly to certain incidents in its history. On or about October 21, 1880, a syndicate entered into a contract with the then Minister of Railways and Canals in Canada for the construction of the Canadian Pacific Railway and the incorporation of a company to be called the Canadian Pacific Railway Company. The agreement provided among other things: (1) (by clause 7) that the company should forever maintain, work and run the Canadian Pacific Railway; (2) (by clause 21) that the company should be incorporated with sufficient powers to enable it to carry out the contract, and that the contract should only be binding in the event of an Act of incorporation being granted to the company in the form thereto appended as Schedule A; (3) (by clause 22) that the Railway Act of 1879, in so far as the same might be applicable to the undertaking referred to in the contract and in so far as not inconsistent therewith or inconsistent with or contrary to the provisions of the Act of incorporation to be granted to the company, should apply to the Canadian Pacific Railway.

No statute was passed incorporating the company, but the Parliament of Canada passed an Act, 44 Vict. c. 1, approving and ratifying the above-mentioned contract. Section 2 of this Act provided: "2. For the purpose of incorporating the persons "mentioned in the said contract, and those who shall be "associated with them in the undertaking, and of granting to "them the powers necessary to enable them to carry out the "said contract according to the terms thereof, the Governor may "grant to them in conformity with the said contract, under the "corporate name of the Canadian Pacific Railway Company, a "charter conferring upon them the franchises, privileges and "powers embodied in the schedule to the said contract and to "this Act appended, and such charter, being published in the "Canada Gazette, with any Order or Orders in Council relating "to it, shall have force and effect as if it were an Act of the "Parliament of Canada, and shall be held to be an Act of "incorporation within the meaning of the said contract."

Pursuant to this Act letters patent incorporating the respondent company were sealed on February 16, 1881. Clause 4 of this charter was in the following terms: "4. All the franchises "and powers necessary or useful to the company to enable them "to carry out, perform, enforce, use, and avail themselves of, "every condition, stipulation, obligation, duty, right, remedy, "privilege, and advantage agreed upon, contained or described "in the said contract, are hereby conferred upon the company. "And the enactment of the special provisions hereinafter "contained shall not be held to impair or derogate from the "generality of the franchises and powers so hereby conferred "upon them."

It is unnecessary to refer in detail to the special provisions therein referred to, but it should be mentioned that they contain a provision in the terms mutatis mutandis of clause 22 of the agreement thus making applicable the Consolidated Railway Act, 1879.

The appellant was anxious to secure that the principal workshops and stockyards of the respondent company for the province of Manitoba should be situated in the City of Winnipeg and entered into an agreement with the respondent company to this end. The agreement is evidenced by by-law No. 148 of the appellant, which was passed on September 5, 1881. The by-law recited, amongst other things, that it was desirable that the principal workshops and stockyards should be situated as aforesaid and that in consideration of the premises it was expedient for the appellant to lend its aid to the respondent company by granting the respondent company by way of bonus debentures of the City as therein mentioned and by exempting the property then owned or thereafter to be owned by the respondent company for railway purposes within the City from taxation forever.

The operative part of the by-law authorized the issue of the debentures to the respondent company when the respondent company should have performed certain conditions, two of which were in the following terms: "3. The said Canadian Pacific "Railway Company, shall immediately after the ratification of "this by-law as aforesaid, make, execute and deliver to the "mayor and council of the City of Winnipeg a bond and covenant "under their corporate seal, that the said company shall with "all convenient and reasonable dispatch establish and build "within the limits of the City of Winnipeg, their principal workshops for the main line of the Canadian Pacific Railway within "the Province of Manitoba, and the branches thereof radiating "from Winnipeg, within the limits of the said Province, and "forever continue the same within the said City of Winnipeg. "4. And by such bond and covenant the said company shall "bind themselves as soon as they conveniently can to procure "and erect within the City of Winnipeg, large and commodious "stock or cattle yards, suitable and appropriate for the central "business of their main line of railway and the several branches "thereof." The by-law went on to provide in clause 8 that upon the fulfilment by the respondent company of the conditions aforesaid all property then owned or thereafter to be owned by the respondent company within the limits of the City of Winnipeg for railway purposes or in connexion therewith should be forever free and exempt from all municipal taxes, rates and levies, and assessments of every nature and kind.

On October 10, 1881, the respondent executed a bond and covenant which, if intra vires, is admitted to be a fulfilment of the conditions of the by-law. On October 30, 1882, the appellant passed by-law No. 195 amending by-law No. 148, but the alterations thus effected are not material to the issues now before the Board.

Doubts appear to have arisen whether by-laws 148 and 195 were intra vires the appellant, and therefore in 1883, on the petition of the appellant, an Act of the legislature of Manitoba was enacted expressly declaring these by-laws valid. Their Lordships pause here to observe that this Act merely precludes any suggestion that the by-laws in question were invalid and does not affect the construction of the agreement referred to therein. *Cf. Ontario Power Company of Niagara Falls* v. *Stamford Corporation.*[1]

The workshops and stockyards were erected, and it was not suggested before this Board that they had not been duly erected and maintained in accordance with the provisions of the deed of covenant.

From 1881 until 1900, when the Railway Taxation Act of Manitoba came into force (Statutes of Manitoba, 63 & 64 Vict. c. 57), the appellant, were it not for the exemption provision contained in the by-law, would have been free to tax the respondent company's property in the City of Winnipeg owned for railway purposes or in connexion therewith. The appellant did not, during that period, demand any taxes in respect of such property, except that it made an unsuccessful attempt in 1894 to collect school taxes. In each of the years 1890 to 1894, both inclusive, the appellant purported to assess certain lands of the respondent company for school taxes. In 1894 the appellant commenced action in the Court of King's Bench for Manitoba to recover the amount of such taxes. The litigation went to the Supreme Court of Canada, which held that the Act of 1883 validating by-law 148 made valid the exemption clause, and that the school taxes in question came within the exemption (*Canadian Pacific Railway Co.* v. *City of Winnipeg Corporation* [2]). A petition of the City for leave to appeal to the Judicial Committee was refused (King's Order, July 24, 1901).

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[1] [1916] 1 A.C. 529, 534.

By the Railway Taxation Act mentioned above, a provincial tax was imposed on the gross earnings of railway companies operating any line within the Province. The railroad companies paying such taxes were to be exempt from all municipal taxation within the Province. This exemption was suspended in 1947.

On February 23, 1948, the appellant purported to repeal by-laws 148 and 195, and in March and June issued the notices to which their Lordships have already referred.

With this short statement of the history of the matter in mind their Lordships turn to the issues now before the Board. The respondent company alleges that it was within its power to enter into the deed of covenant dated October 10, 1881, either (*a*) because being incorporated by Royal charter it had, to use the language of the trial judge, "all the powers possessed by a "corporation at common law," or (*b*) because it had power to execute the deed of covenant under the very wide powers conferred by clause 4 of its charter of incorporation.

The appellant argued that the respondent company had not the powers of a corporation at common law since the power of the Governor-in-Council to constitute a railway company by letters patent under the great seal had been abrogated by section 3 of the Canada Joint Stock Companies Act, 1877, and the respondent company therefore owed its incorporation to the express power conferred on the Governor by the Canadian Statute 44 Vict. c. 1.

The trial judge rejected this argument, and in the Court of Appeal McPherson C.J., Coyne J. and Adamson J. agreed with him, but Richards and Dysart JJ. took the opposite view. In the Supreme Court Estey J. (with whom Cartwright J. concurred) agreed with the trial judge, but Kellock J. took the opposite view. Locke and Kerwin JJ. (with whom Rinfret C.J., Taschereau and Fauteux JJ. concurred) did not find it necessary to determine the point since they were satisfied that the enumerated powers to be found in the charter were sufficient to authorize the respondent company to enter into the deed of covenant.

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[2] (1900) 30 S.C.R. 558.

There is thus a considerable divergence of opinion in the courts in Canada on the first ground on which the respondent company sought to justify its entry into the deed of covenant. Their Lordships do not find it necessary to resolve this divergence, since they are satisfied that the trial judge, the majority in the Court of Appeal for Manitoba and the majority of the Supreme Court of Canada were right in holding that the enumerated powers in the charter of incorporation justified the respondent company in entering into the deed of covenant dated October 10, 1881.

The correctness of this finding depends on the proper construction of the charter, and in particular of clause 4 thereof, which confers on the respondent company: " All the franchises " and powers necessary or useful to the company to enable them " to carry out, perform, enforce, use, and avail themselves of, " every condition, stipulation, obligation, duty, right, remedy, " privilege, and advantage agreed upon, contained or described in " the said contract." This clause appears to be couched in the widest possible terms, and Mr. Fillmore, for the appellant, does not dispute that it would have justified the respondent company in erecting main workshops and stockyards in Manitoba and in entering into agreements with that end in view. Nor could he dispute that it was in the interest of the respondent company to secure, if it could, the immunity from taxation granted by clause 8 of by-law 148; but he pointed out that under the agreement recited in its charter of incorporation the respondent company had contracted " forever efficiently to maintain and use " the Canadian Pacific Railway." He argued that it could not be certain in 1881 that at some future period it might not be necessary, or at any rate advisable, to move the main workshops in Manitoba to some other place than the City of Winnipeg. Therefore, said Mr. Fillmore, it must be ultra vires the respondent company to enter into an agreement forever to maintain its main workshops within the City of Winnipeg. He based this argument mainly on the line of authorities which establishes that a company cannot contract not to use or carry out its chartered powers. See *Ayr Harbour Trustees* v. *Oswald*[3]; *Montreal Park and Island Railway Co.* v. *Chateauguay and Northern Railway Co.*[4]

Their Lordships are unable to see that the deed of covenant of October 10, 1881, infringes this principle. They agree with Locke J. when he said[5]: "Thus, there was conferred upon the "company by section 4 of the letters patent all the powers "necessary or useful to enable it to discharge its obligations "under the contract. It was, in my opinion, for the railway "company to determine the location of its principal workshops for "the main line of the Canadian Pacific Railway within Manitoba "and the branches radiating from Winnipeg and that these "workshops should be continued in such location as it should "determine, and to conclude as favourable a bargain as could be "negotiated with the city or municipality where these were to "be located. By the Fall of 1881 the directors of the company "had evidently reached the conclusion that Winnipeg, by virtue "of its location, was to be the principal city in the Province of "Manitoba and, thus, the most suitable place from which branch "lines such as the line running south to Morris and westerly "through the Pembina Mountains areas, should have their "eastern terminus. The company was not asked by the city in "exchange for the promised tax exemption and the grant of "the debentures to maintain its only railway workshops for the "main line in Manitoba in Winnipeg, but merely the principal "workshops: others might be constructed elsewhere in the "province."

Their Lordships also agree with Locke J. that the observations of Lord Selborne L.C. in *Attorney-General* v. *Great Eastern Railway Co.*[6] are in point. Lord Selborne said: "I assume that "your Lordships will not now recede from anything that was "determined in *The Ashbury Railway Co.* v. *Riche*[7]; it appears "to me to be important that the doctrine of ultra vires, as it was "explained in that case, should be maintained. But I agree with "James L.J. that this doctrine ought to be reasonably, and not "unreasonably, understood and applied, and that whatever may "fairly be regarded as incidental to, or consequential upon, those "things which the legislature has authorized, ought not (unless

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[3] 8 App.Cas. 623.
[4] 35 S.C.R. 48, 57.
[5] [1952] 1 S.C.R. 424, 484, 485.
[6] (1880) 5 App.Cas. 473, 478.
[7] (1875) L.R. 7 H.L. 653.

"expressly prohibited) to be held, by judicial construction, to be "ultra vires." In the present case their Lordships are satisfied that the arrangement pursuant to which the deed of covenant of October 10, 1881, was executed was so incidental, and, indeed, was "useful" to the respondent company within the meaning of clause 4 of their charter and was within their power.

Mr. Fillmore sought to narrow the effect of clause 4 of the charter by a reference to the Consolidated Railway Act, 1879, which by clause 17 of the charter is made applicable to the undertaking of the respondent company so far as not inconsistent with or contrary to the provisions of the charter. Their Lordships are unable to find anything in the provisions of that Act to which their attention was directed justifying such a restriction. Moreover, clause 4 contained an express provision that the powers thereby conferred were not to be impaired by any of the special provisions thereinafter contained.

Their Lordships cannot part with this branch of the case without referring to the decision of the Court of Appeal of Ontario in *Corporation of Whitby* v. *Grand Trunk Railway Co.*,[8] where a contract by a railway company, a predecessor in title in respect of part of the system of the defendant company, to erect and maintain forever the chief workshops of the company at Whitby, was held to be beyond the powers given to that railway company by its statute of incorporation. Their Lordships do not question the correctness of the actual decision that the contract in question did not bind the Grand Trunk Railway Co. since, as pointed out by Armour C.J.O., there is great difficulty in holding that the agreement, if valid, was enforceable against the company, defendant to that action. Apart from that point, however, their Lordships agree with Kerwin J. that the decision, if correct, can only be supported upon the terms of the enactments conferring the particular powers then in question.

The exemption from taxation granted to the respondent company by by-law 148 is therefore binding on the City, but the question remains whether that exemption grants relief from business tax. The trial judge held that it did, but his decision on this point was reversed by the Court of Appeal for Manitoba. Before the matter came to the Supreme Court of Canada that court had delivered its judgment in *Canadian Pacific Railway Co.* v. *Attorney-General for Saskatchewan*[9] to the effect that the exemption granted by clause 16 of the contract recited in its charter of incorporation relieved the respondent company of liability from the business tax referred to in the Saskatchewan City Act, 1947. That business tax differed from the business tax imposed by the City of Winnipeg in that the yardstick by which the liability was measured was floor space in the case of the Saskatchewan tax, whereas in the case of the City of Winnipeg it was rental value. This difference is, however, immaterial, since the Supreme Court decided that the exemption applied whether the yardstick was floor space or rental value, and the parties did not argue before this Board that in this respect the Supreme Court were in error.

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[8] (1901) 1 O.L.R. 480.

[9] [1951] S.C.R. 190.

Mr. Bond, who argued this part of the case, did not address their Lordships at length since the hearing of this appeal followed immediately on the hearing of the appeal in the Saskatchewan case. He adopted the argument of Mr. Leslie in that case, and pointed out that the terms of the exemption in by-law 148 differed from that in clause 16 of the agreement recited in the charter in that the by-law exempted only property then owned or which might thereafter be owned by the respondent company, whereas clause 16 exempted property required and used for the construction and working of the railway. He agreed, however, that there was no suggestion that any of the property in respect of which the respondent company was now seeking exemption from business tax was not owned by the respondent company. Their Lordships are therefore of opinion that the Supreme Court of Canada were right in thinking that on the facts before them there was no material distinction between the two exemptions. Their Lordships have already given their reasons for thinking that the decision of the Supreme Court of Canada in the Saskatchewan case was correct and they need not repeat them.[10]

Their Lordships would, however, observe that the wording of by-law 148 is in one respect wider than the wording of clause 16, in that it grants exemption not only from taxation but also from rates and levies and assessments of every nature and kind. There is therefore some support for the view expressed by McPherson C.J. in the Court of Appeal for Manitoba that an additional reason for holding that the exemption in by-law 148 covered business tax was that the by-law prohibited the City from making the assessment necessary before the amount of the tax could be ascertained.

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[10] Ante, 594, 609.

For these reasons their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the respondent company's costs of the appeal.

Solicitors: *Lawrence Jones & Co.; Blake & Redden.*

J. C.*
1953
July 20.

HARDIAL SINGH AND OTHERS . . . . APPELLANTS;

AND

MALAYAN THEATRES LD. . . . . RESPONDENTS.

ON APPEAL FROM THE HIGH COURT OF APPEAL OF THE COLONY OF SINGAPORE.

Singapore—Landlord and tenant—Rent control—Business premises—Multiple business—Claim to possession of one set of premises—Alternative accommodation — Where business displaced can be adequately carried on—Control of Rent Ordinance, No. 25 *of* 1947, *s.* 14 (1) (*m*).

The Control of Rent Ordinance, 1947, of Singapore, which applies both to dwelling-houses and to business premises, provides in section 14 that: "(1) No order or judgment for the recovery of "possession of any premises comprised in a tenancy shall be made "or given except in the following cases . . . (*m*) in any other case "where the court considers it reasonable that such an order or "judgment be made or given and is satisfied that suitable alterna-"tive accommodation is available for the tenant or will be avail-"able for him when the order or judgment takes effect."

The Control of Rent Ordinance is dealing with a dwelling-house or a business at a particular place, and "alternative "accommodation" in respect of a business means accommodation suitable for the carrying on of the business which has been displaced. There must be shown to be alternative accommodation for the business carried on in the premises comprised in the tenancy, not simply accommodation for carrying on the business of the statutory tenant in some different and diminished way by some kind of rearrangement in the mode of its conduct. And where a multiple business is carried on at a number of different premises, it must be shown, before an order for possession of one set of premises can be made, that the business carried on in those premises can be adequately carried on elsewhere. While all the circumstances must be taken into account, unless the independent requirement of suitable alternative accommodation is complied with the court is not entitled to make an order for possession however much it is persuaded that it is reasonable to do so.

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* *Present*: LORD PORTER, LORD TUCKER, MR. T. RINFRET (CHIEF JUSTICE OF CANADA), and MR. L. M. D. DE SILVA.

Judgment of the High Court of Appeal of the Colony of Singapore affirmed.

APPEAL (No. 16 of 1952) from a judgment of the High Court of Appeal of the Colony of Singapore (July 17, 1951) which reversed a judgment of the High Court of Singapore (April 14, 1951).

The following facts are taken from the judgment of the Judicial Committee of the Privy Council: This appeal was concerned with the construction of the Control of Rent Ordinance, No. 25 of 1947, of the Colony of Singapore, and with the circumstances in which it gave protection to a tenant remaining in possession under its provisions after his contractual tenancy had expired. The Ordinance by section 14 (1) prohibited the recovery of premises let to tenants except in certain specified cases. The terms which were directly applicable in the present instance were those contained in section 14 (1) (*m*) and read: "14.—(1) No "order or judgment for the recovery of possession of any premises "comprised in a tenancy shall be made or given except in the "following cases: . . . (*m*) in any other case where the court "considers it reasonable that such an order or judgment be made "or given and is satisfied that suitable alternative accommodation "is available for the tenant or will be available for him when the "order or judgment takes effect."

It was the application of those provisions to a case of a holding over of business premises which gave rise to the present dispute.

The broad facts were not in controversy. One branch of the appellants' business consisted in the importation of Indian films from India which they distributed to film exhibitors.

The respondents, who were at one time lessees of the Theatre Royal, No. 635, North Bridge Road, Singapore, continued in possession after the expiry of their lease as monthly tenants under the Ordinance. Whilst they were still in possession the appellants, on August 5, 1948, bought the Theatre Royal from the respondents' lessors. They made the purchase because they wanted possession in order that the first, third and fourth appellants could exhibit films which would be sent from India by the second appellant, who dealt in Indian films in Bombay. Accordingly, they served notice to quit on the respondents on November 29, 1948, purporting to terminate the contractual tenancy on December 31, 1948, and a further notice to quit in respect of the protected tenancy terminating on May 31, 1950.

As the respondents, in spite of those notices, refused to vacate the premises the present action was brought on October 3, 1950, claiming possession of the theatre, mesne profits or damages. To that action the respondents claimed the protection of the Rent Ordinance, and the sole dispute now existing between the parties was whether it had been established that it would be reasonable to oust the respondents from the premises and, in particular, whether there was available to the respondents suitable alternative accommodation.

The general facts were not in issue. The appellants, who were not in possession of any theatre in Singapore, were obliged to hire halls in which to show their films at heavy expense, amounting on an average to about 50 per cent. of their takings, whereas if they were able to use the Theatre Royal their business could be carried on much more profitably and conveniently to themselves.

The respondents, on the other hand, owned some eight or nine theatres in Singapore, and were erecting a fresh one at the naval base, though that appeared to be at a considerable distance from the city itself. Their object, it seemed, was to acquire as many cinema theatres as possible and, indeed, after the issue of the writ in the present case, they acquired a theatre formerly known as the " Shirin " and now christened the " Sun."

The trial judge (Storr J.) in making an order for possession in favour of the present appellants held, inter alia, that the evidence established that there was suitable alternative accommodation for the respondents in one of the other cinemas of which they were in possession.

The High Court of Appeal (Brown Ag.C.J. (Singapore), Foster-Sutton C.J. (F. of M.) and Spenser-Wilkinson J.), setting aside the judgment of Storr J., were of opinion that " alternative " accommodation " in the Ordinance meant accommodation suitable for the carrying on of the business which had been displaced, the business at the Theatre Royal, and that if the present respondents were to be deprived of one set of premises, accommodation at another set could not be regarded as available within the meaning of the Ordinance if it was only available to them by displacing the business which they were then carrying on at that other set of premises.

The appellants appealed.

J. C.
1953

SINGH
v.
MALAYAN
THEATRES
LD.

1953. June 22, 23. *Heathcote-Williams Q.C.* and *Lionel Blundell* for the appellants. There are two questions: first, whether in fact there is suitable alternative accommodation available; and secondly, whether it is reasonable that an order for possession should be made. The Ordinance does not say " suitable " alternative accommodation " for the business, but " for him," i.e., the tenant. In the case of a business, it is enough if it can be shown that the tenant has a place where he can conduct his business, and here the court has to address itself to the question whether any of the other theatres belonging to the respondents is suitable alternative accommodation for showing Indian films for the attraction of Indian audiences. The evidence establishes that there was such suitable accommodation in four of the eight cinemas owned by the respondents. If the alternative accommodation is in the respondents' disposition, it is available. There is nothing in the Ordinance which says that if the tenant has nine cinemas he must have protection for nine cinemas. The question must be looked at on the merits of each particular case; and the consequential effect on the landlord and tenant is a question of reasonableness. Hardship, e.g., is a matter for consideration under the heading of reasonableness. Some guidance is given by English cases dealing with dwelling-house accommodation. It is a question of fact and degree, not of law: *Flint* v. *Ead*[1]; *Thompson* v. *Rolls*.[2] So far as a dwelling-house is concerned, the intention of the Ordinance is to make sure that a person has a roof over his head; and applying that principle to business premises, the intention is not to ensure that a person is protected absolutely against any diminution of his business, but to ensure that he has premises in which he can conduct his business and is not deprived of the means of earning his livelihood: *Brown* v. *Brash and Ambrose*,[3] which was referred to in *Hallwood Estates Ld.* v. *Flack*.[4] That gives a reasonable and practical construction of the object and intention of the Ordinance.

Thompson v. *Rolls*[5] shows that other premises of which the tenant is in occupation are not prevented from being alternative accommodation. There is nothing to prevent the landlord offering as alternative accommodation accommodation which is already in the tenant's occupation, and the question of what the tenant loses in convenience and extent of accommodation is a question of reasonableness in each case. [Reference was also made to *McIntyre* v. *Hardcastle*[6]; *Briddon* v. *George*[7]; *Warren* v. *Austen*[8]; and *Luttrell* v. *Addicott*.[9]] All those cases show that in respect of the alternative accommodation one is not required to find all the same facilities. Once it is a question of degree it is a question of fact. Here there is ample evidence of suitable alternative accommodation. The argument stands or falls on the question of treating the matter in two distinct stages: (1) that there is, or can be made available, suitable alternative accommodation, and (2) reasonableness. The respondents had it in their power to make the suitable alternative accommodation available. The fact that the appellants want the Theatre Royal for their own occupation is a relevant fact to be taken into account on the question of reasonableness: *Cumming* v. *Danson*.[10] There was no misdirection by the trial judge. The Court of Appeal misdirected themselves and wrongly construed the provisions of the Ordinance in holding that for accommodation to be suitable and alternative it must be such as would enable the tenant to transfer thereto the business carried on by him at the premises of which possession is claimed so as to be suitable substantially to accommodate a clientele of approximately the same size, a substantial proportion of the staff, mechanical appliances and all the other factors which collectively make up the tenant's business. On a true construction of section 14 (1) (*m*) the trial judge was entitled to hold, and was right in holding, that there is suitable alternative accommodation for the respondents in one of the other cinemas of which they are in possession.

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[1] (1922) 91 L.J.K.B. 132; 37 T.L.R. 708.

[2] [1926] 2 K.B. 426; 42 T.L.R. 582.

[3] [1948] 2 K.B. 247, 254; 64 T.L.R. 266; [1948] 1 All E.R. 922.

[4] (1950) 66 T.L.R. (Pt. 2) 368.

[5] [1926] 2 K.B. 426; 42 T.L.R. 582.

Lionel Blundell, following. The English Act of 1933 in section 3 (3) gives some fairly detailed instructions as to what is to be suitable alternative accommodation. The Ordinance does not do that. The English cases on suitable alternative accommodation are not only addressed exclusively to the question of suitable alternative residential accommodation, but are on those rather special provisions, and in those circumstances those cases have to be viewed in a special light, but nevertheless they have proceeded on certain broad general principles which it is useful to keep in mind. The courts have rejected the notion that any sort of comparison has to be made; it is his reasonable dwelling requirements that have to be considered; he must have a roof somewhere, and it must be a suitable roof. There are two distinct conditions which have to be satisfied in this case: (1) it must be reasonable that the order for possession should be made, and (2) the suitable alternative accommodation must be available. The Court of Appeal were wrong in linking the two things up as two questions which cannot be regarded as separate and distinct. The Ordinance clearly says that they are two matters which have to be considered separately. On availability, the test is, what is available to the tenant, not what the landlord is offering or making available or holding out, or anything of that sort; it is a pure question of what is in fact available to the tenant. Under the English Act the cases have said that in principle other premises which the tenant occupies can be alternative accommodation. Applying the same sort of principle to business premises under this Ordinance, there must be suitable alternative accommodation in which the tenant can carry on his line of business, and then the Ordinance is satisfied, because the tenant is not having his business roof completely taken away from him. If the tenant were to secure a corner—a monopoly—of all the available premises of the particular kind—here cinemas—it would be impossible for the landlord to provide suitable alternative accommodation. One should give the section a reasonable and practical construction rather than one which, presumably, was never intended. If the construction now contended for is right, then the Court of Appeal were wrong when they said that "if the appellants are to be "deprived of one set of premises I cannot see that accommoda- "tion at another set of premises can be regarded as available "within the meaning of the Ordinance if it is only available to "them by displacing the business which they are now carrying "on at that other set of premises."

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[6] [1948] 2 K.B. 82; 64 T.L.R. 260; [1948] 1 All E.R. 696.

[7] (1946) 174 L.T. 380, 384; [1946] 1 All E.R. 609.

[8] [1947] 2 All E.R. 185, 187.

[9] (1947) 63 T.L.R. 68, 70; [1946] 2 All E.R. 625.

[10] (1943) 112 L.J.K.B. 145, 147; 59 T.L.R. 70; [1942] 2 All E.R. 653.

Sir Hartley Shawcross Q.C., *Gahan Q.C.* and *F. R. N. H. Massey*, for the respondents, were asked only to outline their submissions. The first proposition is that the Ordinance was intended, subject to the 13 cases set out in section 14, to maintain the status quo; it was intended to protect people who are in existing occupation of business premises. Secondly, the trial judge allowed his view to be coloured, whether on reasonableness, on alternative, on suitability or availability, by a complete misdirection as to the purpose of the Ordinance. There is nothing in the Ordinance indicating that it was intended to affect only the small shopkeeper. If "tenant" includes "company," and "premises" includes "business premises," there is nothing in the Ordinance which entitles the court to say that it is not intended to protect the multiple shopkeeper as distinct from the individual shopkeeper. If the Ordinance is intended to cover both, the third proposition is that the Ordinance is intended to protect the tenant in respect of his business carried on on the premises against which the landlord's proceedings are directed. It is alternative accommodation to the Theatre Royal's business that must be both (a) suitable, and (b) available. It is a protection not in relation to the totality of the business, but in relation to the business carried on in particular premises. The case breaks down at "suitability." It also breaks down on "availability." Those other theatres are not available in a business sense or in a legal sense; if accommodation is only available by dispossessing a business which is already being conducted, it is not available at all. The contrary view would mean that the multiple shopkeeper could be dispossessed of all his shops one by one until he got to the last. There is little to be said on reasonableness; it can only be considered in the light of the particular alternative accommodation which is suitable and available. There are many other matters which the trial judge ought to have taken into account and apparently did not.

Those are the submissions in outline. The trial judge has completely misconstrued the Ordinance, and in doing so has coloured his view of all the specific questions to which he ought to have directed his mind, and to which, in consequence of his construction, he did not. The alternative accommodation is not suitable unless it is capable, reasonably and substantially, of accommodating the business which is dispossessed.

Heathcote-Williams Q.C. replied.

July 20. The judgment of their Lordships was delivered by Lord Porter. The Ordinance in question is founded upon the English Act of 1933, but in certain respects it gives a considerably wider protection to tenants. The provisions of the English Acts throughout their existence have been limited to cases where either the rent or rateable value is less than a specified quantum, and also are confined to dwelling-houses as opposed to business premises. The relevant Ordinance, on the other hand, contains no limitation of value and extends its protection to all premises, whether used for business or as dwelling-houses. Their Lordships may therefore at once state that they get very little assistance from cases which have been decided upon the terms of the

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English Acts, since in their view principles applicable to the retention by tenants of places which are required as a home have very little bearing on the position of a tenant who requires a place in which to conduct his business.

[His Lordship then stated the facts set out above and continued:] It appears that some of the appellants' films have been shown at the Theatre Royal under the auspices of the respondents, and there is evidence that some two or three, at any rate, of the other theatres which are in use by the respondents are suitable for the showing of Indian films. Without deciding the matter, their Lordships are prepared to assume that such is the case and, indeed, are willing to assume that the films now exhibited at the Theatre Royal would be suitable for exhibiting at some at least of the other theatres, but whether they could be shown without interfering with or, indeed, putting an end to the exhibitions which are being carried out at those other theatres, or could be shown at a profit, has never been inquired into or established.

The problem therefore resolves itself in the question whether the respondents are obliged so to rearrange their business as to fit the programmes now arranged for and shown at the Theatre Royal into other theatres and, if necessary, close down or alter their performances in those others in order in this way to carry on the performances now taking place at the Theatre Royal in some one or more of the other theatres which are in their possession.

The best and, perhaps, the only way in which this argument can be supported is, as the appellants maintained, that the respondents' business must be regarded as a whole: they are exhibitors of films: provided they can carry on that business in some alternative accommodation, even if the business is to some extent diminished, their rights are maintained: the fact that one source of profit is eliminated is not a vital matter. This, as their Lordships apprehend, is the view of the trial judge. He said: "I "must now consider whether I am satisfied that suitable alterna- "tive accommodation is available for the defendants or will be "available for them when any order or judgment I may make "or give takes effect. Now a cinema is a particular type of "premises run for the purpose of entertaining the public and in "a city like Singapore such premises are limited. This is not just "a case of a tenant who is endeavouring to continue in possession "of his premises because they are necessary for the running of "his business; it is the case of a tenant who wishes to continue "in possession because, in the words of the defendants' manager,

" 'we try to get as many theatres as possible.' In other words, " it is the case of a tenant who wishes to acquire and control an " ever increasing number of cinemas in Singapore. I cannot " think that the Ordinance was framed to protect tenants of this " class.

" In this case the first plaintiff in his evidence has shown, and " in fact it was not disputed by the evidence of the defendants' " manager, that the defendants are in possession of eight cinemas " in Singapore other than the Theatre Royal. Further, the " manager stated that the defendants were building a new cinema " at the naval base, Singapore, which would be completed in a " few months. Now the policy of what films should be shown " in any particular cinema must be dictated by the person who has " control of the cinema. It is therefore clear to me that in any " of the eight cinemas controlled by the defendants Indian films " could be shown if the defendants so desired, and therefore I am " satisfied that there is suitable alternative accommodation for the " defendants in one of the other cinemas of which they are in " possession."

The High Court of Appeal, on the other hand, were of opinion that alternative accommodation meant accommodation suitable for the carrying on of the business which had been displaced, i.e., the business carried on at the Theatre Royal. Their words are: " But even if it were practicable and possible to overcome the " objections to which I have referred, it would only be possible to " transfer the business from the Theatre Royal to one or more of " these other theatres by displacing the business which the appellants are now carrying on at the theatre or theatres to which " the business from the Theatre Royal is transferred. And if the " appellants are to be deprived of one set of premises I cannot " see that accommodation at another set of premises can be " regarded as available within the meaning of the Ordinance if it " is only available to them by displacing the business which they " are now carrying on at that other set of premises.

" It seems to me that if the judge had given full consideration " to the various factors which collectively constitute the appellants' business he could not, upon the evidence, have been " 'satisfied that there is suitable alternative accommodation for " 'the defendants in one of the other cinemas of which they are " 'in possession,' because in my opinion no such evidence exists. " I would therefore allow the appeal with costs here and in the " court below."

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Their Lordships find themselves in agreement with the opinion of the High Court of Appeal rather than with that of the trial judge, and more especially with the view that there is no evidence of suitable alternative accommodation at one or more of the theatres in the possession of the respondents.

It is true that the alternative accommodation is required to be available to the tenant, and it is urged that if he can carry on his type of business adequately elsewhere it is immaterial that he cannot carry on that particular portion of it which was formerly centred in a particular place. The observation has an element of truth, but it must be remembered that the Ordinance is dealing with a dwelling or business at a particular place. "No order or "judgment for the recovery of possession of any premises com-"prised in a tenancy" is the phraseology used, and in their Lordships' judgment this wording means that there must be shown to be alternative accommodation for the business carried on in those premises, not simply accommodation for carrying on the business of the statutory tenant in some different and diminished way by some kind of rearrangement in the mode of its conduct.

Their Lordships are not disposed to lay down a general rule to the effect that a multiple business can never be so dealt with as to make the closing of one of their multiple shops possible by the provision of alternative space in another or others. But there must be evidence that the business carried on at the premises about to be surrendered can be suitably accommodated in the remaining premises. It is not enough to make a general statement or express a general finding that because the tenants have a widespread business conducted at a number of premises, it must be possible for them to carry on by some kind of rearrangement the business for which the tenancy to be surrendered was in use. It must, in their Lordships' opinion, be shown that the business carried on in those premises can be adequately carried on elsewhere. All that has been proved in the present case is that there are other premises in the possession of the respondents at which Indian films could be shown, possibly at a profit. Even if wholly true that, as their Lordships think, has no bearing on the question whether the films exhibited at the Theatre Royal which are now mainly Indian, or the business now carried on there, can be transferred to other suitable premises, or, indeed, that a complete or partial transfer would not necessitate the suppression in whole or in part of the activities at other theatres.

No doubt this conclusion is in some sense a hardship on the appellants, who own the one theatre only and can only get access to others by a heavy payment. Further, it is urged that the judge was right in saying that the Ordinance was not framed to protect tenants of this class. The question, however, of discovering what class of persons the Ordinance is meant to protect can only be solved by an exact construction of the provisions which it contains. Apart from its wording their Lordships are unable to speculate what its general intentions were or what its terms mean. It might have been intended to have only a limited effect, but there is nothing in its provisions to lead to such a conclusion. As has been pointed out, it has no limit of values and no limit in the use to which premises may be put. It is couched in the widest possible terms, and though the appellants' argument might be a ground for supporting a change in the policy of the legislature, their Lordships would not be justified in construing the Ordinance in a sense which its terms do not warrant.

It was, however, further suggested, as their Lordships understood the argument, that both in the English Act and in the Singapore Ordinance the consideration which is placed first and is primarily to be considered is whether the court considers the order for possession reasonable, and what is to be regarded as suitable alternative accommodation must largely depend on the view which the court takes of that earlier question. The circumstances, the appellants contend, must be considered as a whole and, if the court in its discretion thinks that the premises should be returned to their owners, only scant proof of the existence of suitable alternative accommodation is required. Accommodation may be suitable, it is said, though much less convenient and differing in quality and quantity from that taken away, provided that there is some kind of alternative accommodation and that the court thinks it reasonable to make the order prayed for.

In their Lordships' opinion, so to interpret the Ordinance is to give a discretion to the court far beyond that which the wording permits. In their view there are two separate requirements for the exercise of the court's discretion, (1) an order for possession must be considered reasonable by the court; and (2), it must be established that there is suitable alternative accommodation. It is true that all the circumstances must be taken into account, but after they have all been duly weighed it is still incumbent on the court to find as an independent and essential requisite that suitable alternative accommodation exists or will exist when any

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order or judgment for possession takes effect. Unless this requirement is complied with no court is entitled to make an order, however much it is persuaded that it is reasonable to do so, and though, as in this case, the judge who tried the case finds it reasonable, there was, in their Lordships' view, no evidence of suitable alternative accommodation.

In the present case, therefore, as they have indicated, their Lordships are of opinion that the existence of suitable alternative accommodation has not been established. They will accordingly humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the costs of the proceedings before their Lordship's Board.

Solicitors: *Kenneth Brown, Baker, Baker; Coward, Chance & Co.*

[HOUSE OF LORDS.]

LATIMER . . . . APPELLANT;

AND

A. E. C. LD. . . . . RESPONDENT.

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Apr. 27, 28, 29, 30;
June 25.

Factory—Floor—Maintenance—Flooding of factory floors by exceptional rainfall—Gangway slippery with mixture of water and escaped oil—Workman allowed to work there—Injury—No negligence—No breach of duty to maintain gangway—Meaning of "maintain"—Factories Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *ss.* 25 (1), 26.

During an unusually heavy rainstorm the floors of a large factory were flooded and an oily cooling mixture, normally contained in a channel in the floor, along which it was pumped to machinery, rose and mixed with the flood waters, so that, when they subsided the floor became slippery. So far as supplies permitted, sawdust was spread on the floor, but some areas were left untreated. A workman, working in a gangway which had not been treated with sawdust, was attempting to load a heavy barrel on to a trolley when he slipped and injured his ankle. He brought an action against his employers, claiming damages in respect of his injuries:—

Held, (1) that the employers were not negligent, as they had done all a reasonable employer could be expected to do for the safety of their servants, having regard to the degree of risk; and (2) that there was no breach of the statutory duty under section 25

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* *Present*: LORD PORTER, LORD OAKSEY, LORD REID, LORD TUCKER and LORD ASQUITH OF BISHOPSTONE.

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of the Factories Act, 1937, to see that the floors were "of sound "construction and properly maintained," since the floor was structurally sound and could not be said not to be properly maintained because it was in a transient and exceptional condition of being wet and oily; whether such temporary inefficiency constituted a breach of duty was a question of degree.

Decision of the Court of Appeal [1952] 2 Q.B. 701; [1952] 1 T.L.R. 1349; [1952] 1 All E.R. 1302 affirmed.

APPEAL from the Court of Appeal (Singleton, Denning and Hodson L.JJ.).

This was an appeal by Albert Richard Latimer (the plaintiff in the action) from an order of the Court of Appeal dated May 1, 1952, whereby a judgment given on February 8, 1952, by Pilcher J. in his favour, for £550 damages with costs, was set aside and judgment entered for the respondent company, A. E. C. Ld. (the defendants), with the costs of the action and of the appeal.

The appellant recovered judgment for the sum of £550 as damages for injuries which he alleged had been the result of a failure on the part of the respondents, in breach of their statutory duty, to maintain one of the gangways in their works in an efficient state. He relied also on an allegation of common law negligence. Pilcher J. rejected his claim based on a breach of statutory duty, but held the respondents guilty of common law negligence. The Court of Appeal agreed with the judgment of the judge on the claim for breach of statutory duty, but were of opinion that there was no common law negligence on the part of the respondents.

The relevant facts emerging from the evidence were undisputed and were stated by Lord Porter as follows: The appellant was a horizontal milling machine operator employed by the respondents in their works at Southall. At those works they employed some 4,000 persons and the works themselves extended over an area of about 15 acres. On August 31, 1950, the appellant was working on the night shift in the general machine room and came on duty at about 7.45 p.m. His work involved collecting barrels containing bundles of hand brake levers and weighing about 2 cwt. They had to be conveyed by him on a trolley along a passage or gangway for a distance of about 30 yards from the place where they were stored. Between about 12 noon and 3 p.m. on that afternoon there had been an exceptionally heavy storm of rain which caused the whole of the premises to become flooded with surface water. That water became mixed with an oily liquid known as "mystic," which was normally collected in

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channels in the floor of the building. Those channels were covered with iron lids which were not watertight. The "mystic" was soluble in water and was used to act as a cooling agent for the machines. When the water which had so been impregnated drained away from the floor it left an oily film upon the surface which was slippery. After the rainfall had subsided the respondents spread sawdust on the floor so far as they had a sufficient quantity for that purpose. In spreading it and in cleaning the floor they immediately employed about 40 production service labourers and between the end of the day shift and the start of the night shift they employed 24 volunteers. Men were also detached from the night shift for cleaning. They had in fact three tons of sawdust at hand, enough for any occurrence which they could be expected to foresee, but, owing to the unprecedented force of the storm in question and the large area which had to be covered, there was insufficient sawdust to place it on portions of the floor, including the part of the floor where the barrels were situated. The principal object of spreading sawdust on the floor was to dry it, but incidentally it would also have some effect in decreasing its slipperiness. The respondents knew that the coating of the floor with the mixture of "mystic" and water would to some extent increase its slipperiness. They also knew that the appellant in the course of his work would have to collect the barrels at the place in question. At about 8.45 p.m., in the course of his work, without realizing the danger, he went to collect a barrel with the help of a fellow workman and succeeded in getting the metal lip of a trolley under the base of the barrel in order to raise it from the floor. He then placed his right foot on the axle of the trolley and pushed with his left foot, using considerable force, but his left foot slipped on the oily surface of the floor with the result that he fell on his back and the barrel rolled off the trolley and crushed his left ankle.

The appellant in evidence admitted that "you always get a "certain amount of grease about." He also admitted that, apart from himself, no one, so far as he knew, had ever fallen down and hurt himself because of flooding in the factory. Albert Ampstead, who was employed at the factory, said in evidence that "there is always a certain amount of grease on the floor." He said that he had seen "mystic" come out of the channels, owing to flooding, four or five times. George Milne, the respondents' safety engineer, said that he would not have gone on the slippery floor to pull a thing about or put on a strain because it would be too dangerous.

Pilcher J. found that the respondents took every step which they could reasonably have taken to deal with the conditions prevailing when the night shift came on duty, and he negatived every specific allegation of negligence pleaded. But, although no questions were put to their witnesses in cross-examination suggesting that they should have closed the factory, he raised the point during the argument. No application was made for an adjournment or for amendment of the pleadings. Pilcher J., in holding the respondents negligent, said that he did not shrink from the conclusion that the respondents' duty, if they desired to escape liability for accidents due to the slippery condition of the floor, might have been to send away all the men who were not prepared to volunteer for cleaning work.

Beney Q.C. and *Jukes* for the appellant. Two contentions are submitted on behalf of the appellant. (1) On its true construction, section 25 (1) of the Factories Act, 1937, in its application to " floors, steps, stairs, passages and gangways " in a factory is not confined to the proper repair and keeping in repair of those parts of the factory, but extends to keeping the surfaces of those parts in a safe and proper condition. The case involves the construction of the definition of the word " maintained " in section 152 (1) of the Act. (2) On the facts as found by Pilcher J. he was justified in deciding that the respondents had caused the injuries to the appellant by neglect of their common law duty to take reasonable care for his safety while he was at work. The finding should not have been disturbed.

On the true construction of section 25 (1) there was a proved breach of the section, which caused the accident. This contention is supported by *Galashiels Gas Co. Ld.* v. *Millar*,[1] which indicates that the words " in efficient working order " must be incorporated into section 25 from the definition of " maintained " in section 152 (1). From that case it appears that the lift there in question had to be maintained in efficient working order as an absolute and continuing obligation. The obligation so to maintain it would have involved maintaining the safety of its floor.

[LORD TUCKER. Would you say that a piece of orange peel on the lift floor would be a breach of the obligation?]

No, it must be a question of degree. Section 25, here in question, is enacted for the protection of the workman and, as regards a floor, the most common peril is that of slipping. The appellant's contention is supported by the terms of sections 16, 29 (4) and (5), 30, 33 (1) and 34 (2) of the Act. An oily floor is not a floor which is properly maintained and efficient, even if it is structurally sound, as this one was. If the higher rungs of a ladder were greasy and slippery, and a man slipped on them, it would be clear that the ladder was not properly maintained or in efficient working order. Though perhaps "working order" is not a well-chosen expression to apply to a floor, a slippery floor can certainly be said not to be "in an efficient state." An efficient floor must be fit for the purpose for which it is intended, viz., for walking on, and it cannot be efficient if people slip on it. It may be that one slippery object on a floor would not render it in law inefficient or unsafe, but it would be different if there were, say, three. The courts below took too narrow a view of the operation of section 25. If the circumstances of this case come within the mischief aimed at by the section, it does not matter that it was not the fault of the employers that the "mystic" got on to the floor; they knew that a quantity of it was there and, indeed, took some steps to neutralize its effects.

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[1] [1949] A.C. 275, 286–7; 65 T.L.R. 76; [1949] 1 All E.R. 319.

Davies v. *de Havilland Aircraft Co. Ld.*[2] is distinguishable, for the remarks of Somervell L.J. which are relevant to this case were made obiter. Alternatively, its reasoning is unsound. *Cole* v. *Blackstone & Co. Ld.*[3] indicates that the obligation imposed is absolute and cannot be discharged by the occupier of the factory taking all practical steps to ensure efficient state and good repair.

Jukes following. The employers were in breach of their common law duty in causing the workman to work on a dangerously slippery floor. The question here is whether the judge had evidence before him on which he could have found that the man should not have been allowed to work where he did. The degree of danger was such as to necessitate precautionary steps being considered. In the statement of claim it was alleged that the floor on which the workman was working was oily, slippery and greasy, and this is not disputed. It was also alleged that the method of making such a floor safe was by spreading sawdust on it, and that at the place where he was working this precaution was not in fact taken. Thus the employers failed to provide safe premises or to take normal precautions to render them safe. It was not necessary to call witnesses to say that the gangway in which the workman was working at the time of the accident might have been roped off or that the foreman might have forbidden him to go there. In considering the precautions to be taken one must weigh the degree of danger against the magnitude of the operation necessary to guard against it. Here, besides the spreading of sawdust, there was an obvious alternative method. On the evidence the danger was such that this part of the factory should have been shut down for the night. The Court of Appeal were wrong in thinking that Pilcher J. held that the whole factory should have been closed; he merely meant that such a thing might in certain circumstances be necessary. The workman who had formerly worked here in safe conditions was now being required to work in dangerous conditions and to undergo a risk without the option of refusing.

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[2] [1951] 1 K.B. 50; [1950] 2 All E.R. 582.

[3] [1943] K.B. 615; 59 T.L.R. 374.

Though contributory negligence on the workman's part was alleged in the defence, this was not pursued.

Everett Q.C. and *Croom-Johnson* for the respondent company. There was no breach of the common law duty owed by the employers to the workman, nor was there any breach of section 25 (1) of the Factories Act, 1937.

In the court of first instance it was alleged that the drainage system was inadequate, that the floor was left oily and slippery, contrary to section 25 (1), that there was not enough sawdust, that inadequate use was made of it and that more sawdust should have been obtained. Pilcher J. negatived these points. If in the statement of claim there had been an allegation of negligence in allowing this workman to work on the night shift and failing to close the factory, it would not have been enough for the workman to show that there was a part of the floor where there were potentialities of slipping; he must have shown an act or omission which was negligent in the circumstances. The test is whether the employers discharged their duty to act reasonably in the circumstances: *Winter* v. *Cardiff Rural District Council.*[4]

On the question of statutory duty, one must consider what was the mischief aimed at by section 25 (1) of the Factories Act, 1937. One must also consider the particular results of any construction, in relation, for example, to sections 130 and 131, dealing with offences and fines. If the employers' construction were right, coke left on a boiler house floor would be a breach of statutory duty because someone might tread on it and injure his

[4] (1950) 114 J.P. 234; [1950] 1 All E.R. 819.

foot. But that is absurd. Nor is there any substance in the distinction sought to be drawn between leaving one slippery object on a floor and leaving, say, three. The subsection imposes a duty only in relation to the actual construction and the proper maintenance of that construction of the floors, steps, stairs, passages and gangways therein mentioned. In the words of reason 2 of the printed case for the respondent company: "The definition "of the word 'maintained' in section 152 (1) of the Factories "Act, 1937, means in relation to section 25 (1) of the said Act "that it is the sound construction which has to be maintained in "an efficient state, in efficient working order and in good repair." Section 25 (1) is concerned with the construction of the floor rather than its user, that is, with the floor as a floor. If one gets away from sound construction one cannot speak of the "efficient "working order" of a floor, and then, to avoid the difficulties of the case, the expression "of sound construction and properly "maintained" must be limited to good repair. As a floor this floor was in an efficient state. If this subsection had been intended to deal with substances or articles superimposed on the floor it would have been easy so to express it. The mere fact that its framers had safety in mind does not help its construction. A slippery floor may be an unusual danger of which the occupier of premises knew or ought to have known; that would be a question of degree, but it is not a breach of an absolute statutory duty.

By analogy, if the contentions for the appellant were right, the amendment of the Woodworking Machinery Regulations, 1922 (S.R. & O. 1922, No. 1196) by the Woodworking (Amendment of Scope) Special Regulations, 1945 (S.R. & O. 1945, No. 1227) would have been unnecessary.

Galashiels Gas Co. Ld. v. *Millar* [5] is not authoritative in this case. The distinction is that there was there a finding of fact that the mechanism in question had failed, but the finding of fact here was that the floor did not fail as a floor. What did fail was the drainage system and the supply of sawdust. That authority, properly appreciated, does not support the appellant's case but is against it. There is a remarkable absence of authority on the construction of section 25 (1). *Davies* v. *de Havilland Aircraft Co. Ld.*[6] and *Pitfield* v. *Railway Executive* [7] are in favour

[5] [1949] A.C. 275.

[6] [1951] 1 K.B. 50.

[7] (1942) Winchester Assizes (Unrep.).

of the respondent company. See also *Carroll* v. *Andrew Barclay & Co. Ld.*[8] and *Mayne* v. *Johnstone & Cumbers Ld.*[9]

On the common law aspect of the case it was proper to disturb the judge's finding. He was wrong in imposing on the employers so high a standard of care at common law. This was not a case in which the Court of Appeal was at a disadvantage in not seeing the witnesses. In effect, the appellant is seeking to apply to this case the maxim res ipsa loquitur, but it is necessary to define the scope of the duty owed. The degree of risk is only half the problem to be considered: see *Winter* v. *Cardiff Rural District Council*,[10] *per* Lord Porter. The duty on the employers is to act reasonably towards their employees in all the circumstances. The only breach of duty alleged against them is that they did not close the works. But that was no breach of duty. A similar problem may face a road haulage undertaking when the roads are known to be slippery. Then one would distinguish between the case when all the roads are like a skating rink, and it would be wise to send out no vehicles, and the case when there are only some patches of slipperiness which the drivers can avoid. To close this factory down and send the night shift home would have been a very serious step. The risk is to be balanced against the consequences of not doing so. It is plain that neither party thought that it was too dangerous to work, a point on which an experienced machine operator is in just as good a position as a foreman to make a decision.

On the question of common law duty, see *Barkway* v. *South Wales Transport Co. Ld.*[11]; *General Cleaning Contractors Ld.* v. *Christmas*[12]; *Daborn* v. *Bath Tramways Motor Co. Ld.*[13]; *London and North Eastern Railway Co.* v. *Berriman.*[14]

Croom-Johnson following. Assuming that in construing section 25 (1) and finding what is meant by the word "maintained" one must read into it the definition of "maintained" in section 152 (1), then it is possible to select those parts of the definition which apply to the subject-matter which one is considering in any particular section. Thus the three limbs of the definition can be read selectively or distributively. Sometimes all the limbs may apply, sometimes two or one only. "Efficient working

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[8] [1948] A.C. 477, 489, 492; 64 T.L.R. 384; [1948] 2 All E.R. 386.

[9] [1947] 2 All E.R. 159.

[10] (1950) 114 J.P. 234, 237; [1950] 1 All E.R. 819.

[11] [1950] 1 T.L.R. 597, 604; [1950] 1 All E.R. 392.

[12] Ante, 197; [1952] 2 All E.R. 1110.

[13] [1946] 2 All E.R. 333, 336.

[14] [1946] A.C. 278, 313; 62 T.L.R. 170; [1946] 1 All E.R. 255.

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"order" is admittedly inapplicable to floors, since they are wholly and permanently passive. So is "efficient state," since the expression connotes at least potential activity or mobility, such as causes an effect. Thus in the case of floors the words "in "good repair" are alone applicable, and they are satisfied by adequate repair of the structure. One may contrast the effect of applying this definition to section 25 (1) and to section 31 (3) dealing with air receivers, where one has something capable of activity to which the words "efficient state" can properly apply.

Beney Q.C. in reply. As to the last argument presented, it assumes almost everything that underlies the appellant's argument, the distinction between construction and maintenance in the sense that maintenance goes beyond mere construction. "Efficient working order" would cover everything that this argument seeks to make the subsection cover, but "efficient "state" points to something which is static.

As to the common law aspect of the case, the employers knew that there had been flooding all over the factory and that very probably there were areas where the "mystic" remained after the water had subsided. But the sawdust was used primarily, if not entirely, to mop up the wet like blotting-paper, not to obviate the danger. From the afternoon, when the situation was created, the employers did nothing to ascertain whether there were slippery areas and, if so, how bad they were. They did nothing to protect the night shift.

As to the Act, the problem before the court in considering whether the floor was "in an efficient state" is not solved by finding whether there was anything which was not completely perfect. The test is a broad one. Section 25 (1) was not meant to make the employers insurers nor to cover trivial deficiencies. But the floor was not safe for the purpose of doing the operation which the injured man was doing and so it cannot have been "in "an efficient state." Efficiency means efficiency for safety in achieving the result for which a thing is intended. Subject to the principle de minimis, the use of an object must not be fraught with risk or danger to those who have to come into contact with it. The efficient state of a floor includes its surface, and the question whether a slippery floor is dangerous must be considered. The main function of a floor is to be trodden on, and if it is dangerous because of a film intervening between it and the foot it is not in an efficient state. Nothing in section 25 (2) is inconsistent with the argument presented on behalf of the workman.

[He referred to *London and North Eastern Railway Co.* v. *Berriman*[15] and *Harrison* v. *National Coal Board.*[16]]

Their Lordships took time for consideration.

June 25. Lord Porter stated the facts and continued: My Lords, undoubtedly the respondents did their best to get rid of the effects of the flood, employing such of the day workers as could be spared and obtaining volunteers from them for work in the interval between day and night work and from the night shift at a later period, but in the learned judge's opinion it was not possible for them to take any further steps to make the floor less slippery. I understand his view to have been, however, that, inasmuch as the effect of the storm left the gangway in question, and possibly other portions of the works, somewhat slippery and therefore potentially dangerous, they should have shut down the whole works if necessary, or at any rate such portion as was dangerous.

My Lords, the difficulty which I feel about this solution is that neither the necessity for such an action nor its effect was ever pleaded, explored or considered until the respondents' counsel was in the course of making his final speech. No doubt the point was then raised and argued on behalf of the respondents. It may indeed be that an adjournment could have been asked for at that stage and evidence called on either side. But to take such action would have meant recasting the whole framework of the case, and I do not think it was incumbent upon the employers' representatives to take this course. In my opinion they were entitled to rest upon the evidence as given and to ask that it should be considered as a whole and the requisite inference drawn from it. It was urged the mere happening of such an accident cast the onus on them of explaining it and excusing themselves, but the facts material to the matters pleaded had been given in evidence and where the relevant facts have been established no question of onus arises.

A number of complaints of negligence and breach of duty are set out in the statement of claim, but so far as common law negligence is concerned I can find no suggestion that the factory should have been closed, nor was any amendment asked for or permitted to that effect. All the particulars set out in the statement of claim consisted of complaints which the judge found not to have been established and which were not persisted in before your Lordships.

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[15] [1946] A.C. 278, 301, 308.

[16] [1951] A.C. 639, 650; [1951] 1 T.L.R. 1079; [1951] 1 All E.R. 1102.

Upon the issue of common law negligence as now presented the direction which should be given is not in doubt. It is that the duty of the tribunal is to determine what action in the circumstances which have been proved would a reasonably prudent man have taken. The probability of a workman slipping is one matter which must be borne in mind but it must be remembered that no one else did so. Nor does the possibility seem to have occurred to anyone at the time. It is true that after the event Mr. Milne, one of the respondents' witnesses, expressed the opinion that he would not have gone on to the floor in the condition in which it was and that it would be too dangerous to do so. But this was after the event, and though he was the respondents' safety engineer and was present until late that night, it seems never to have occurred to him that there was any danger or that any further steps than those actually taken were possible or required for the safety of the employees. The seriousness of shutting down the works and sending the night shift home and the importance of carrying on the work upon which the factory was engaged are all additional elements for consideration and without adequate information on these matters it is impossible to express any final opinion. Moreover, owing to the course taken at the trial there is no material for enabling one to judge whether a partial closing of the factory was possible or the extent to which the cessation of the respondents' activities would have retarded the whole of the work being carried on. In my view, in these circumstances, the appellant has not established that a reasonably careful employer would have shut down the works or that the respondents ought to have taken the drastic step of closing the factory.

The question whether there has been a breach of statutory duty turns upon the true construction of section 25 of the Factories Act, 1937. That section provides that: "All floors, "steps, stairs, passages and gangways shall be of sound con-"struction and properly maintained," and section 152 (1) defines "maintained" as meaning "maintained in an efficient state, in "efficient working order, and in good repair." Section 25, were it not for the definition, would seem merely to provide for sound construction and a proper state of repair. But the definition does give rise to a more difficult problem inasmuch as it requires both the existence of "good repair" and an "efficient state." The further provision as to "efficient working order" may be

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neglected since that requisite is more appropriate to working machines than to a static portion of the premises.

It has still, however, to be determined what it is which has to be in an efficient state. Does it include the elimination of some matter which is temporarily superimposed upon the floor or is the requirement confined to the floor itself? To be efficient, the appellant contended, the floor must be fit for any of the purposes for which it is intended, e.g., for support and for passing over in safety. The difficulty of such a view is that it puts an excessive obligation upon the employer. Indeed, it was conceded that it could not be carried to the length of saying that a temporary obstruction, such as a piece of orange peel or the like, would make it inefficient. Once this concession is made it becomes a question of the degree of temporary inefficiency which constitutes a breach of the employer's obligation.

Primarily, in my opinion, the section is aimed at some general condition of the gangway, e.g., a dangerously polished surface or the like or possibly some permanent fitment which makes it unsafe. But I cannot think the provision was meant to or does apply to a transient and exceptional condition. If it had been directed to such a state of affairs it would have been easy to say so. Indeed, in section 34 (2), the kind of language appropriate to such an object is to be found where there is provision that: "All means of escape . . . shall be properly maintained and kept "free from obstruction." Perhaps the best illustration of the extent of the obligation which has reached your Lordships' House is to be found in *Galashiels Gas Co. Ld.* v. *Millar*,[1] where the grips which ought to have held a lift in place at one of the floors for some unaccountable and unascertainable reason failed to act with the result that one of the workmen fell down the shaft and was injured. No blame could be attached to the employers, yet as the duty was absolute your Lordships held them liable. The decision was given on the very section now under discussion and was much relied upon by the appellant. It differs, however, from the facts of the present case in that the lift itself was out of order, no temporary superincumbent danger had been added to it. It is no authority, therefore, for holding the respondents liable in the present case.

It may be added as an additional factor that the obligation is a penal one, that the phraseology is at least ambiguous and although it has to be remembered that the Act is intended for the protection of workmen and to that extent should receive a benevolent construction, yet employers are not lightly to be made criminals unless a clear direction of an Act of Parliament has that effect.

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[1] [1949] A.C. 275; 65 T.L.R. 76; [1949] 1 All E.R. 319.

I agree with the Court of Appeal that this point fails and that there was no negligence at common law. I would dismiss the appeal with costs.

LORD OAKSEY. My Lords, I agree. On the question of common law negligence I have come to the conclusion, though not without doubt, that the judgment of the Court of Appeal ought to be affirmed. What is negligence is, in my opinion, a question of fact to be decided by the tribunal of fact. In the present case, although Pilcher J., who tried the case, did not, in terms, say that he was applying the standard of care which an ordinary prudent employer would have taken in all the circumstances, there is, in my view, no doubt that he intended to apply that standard. If he did, and if there was admissible evidence upon which he might base his finding, that finding ought only to be set aside where it is clear that he was wrong. There was such evidence in the present case, since the respondents themselves proved that the flooding of their factory was unprecedented; that, owing to their system of partially open "mystic" drains, oil in such circumstances would and did escape over the factory floor; that in view of this state of affairs they put 40 men on specially to lay down all the sawdust they had on the floors and passages; that they kept 24 volunteers on to continue the work of cleaning the floors and passages but that they did not stop the work of the factory but allowed the night shift to come on duty. Now, although it is true that no questions were put in cross-examination to the respondents' witnesses suggesting that they ought to have closed the factory, the point was raised by the judge during the argument and no application was made for an adjournment or for an amendment of the pleadings. The facts, indeed, were admitted and the principal question on the issue of common law negligence was whether such facts amounted to negligence. It does not seem to me that if a jury had found in such circumstances that the respondents had been negligent the Court of Appeal could properly have set aside their verdict. But no doubt a judge's finding is not entitled to the same finality and I think, on the whole, that since the evidence as to the condition of the floors and passages at the time the night shift came on was very meagre and that practically the only evidence of their slippery condition was the accident to the appellant, I come to the conclusion that

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the conduct of the respondents can, at the highest, be said to have been an error of judgment in circumstances of difficulty, and such an error of judgment does not, in my opinion, amount to negligence.

On the question of the construction of section 25 (1) of the Factories Act, 1937, I am of opinion that by virtue of that section and the interpretation section 152, the respondents were bound to maintain the floors and passages in an efficient state, but I do not consider that it was proved that they were not in an efficient state. A floor does not, in my opinion, cease to be in an efficient state because a piece of orange peel or a small pool of some slippery material is on it. Whilst I do not agree that the maintenance of the floors is confined to their construction, I think the obligation to maintain them in an efficient state introduces into what is an absolute duty a question of degree as to what is efficient.

I therefore agree that this appeal should be dismissed.

LORD REID. My Lords, a film of oil had been deposited by flood water on the floor of the respondents' factory. At a place where sawdust had not yet been applied to it the appellant without realizing the danger tried to get a heavy barrel on to a trolley; he was standing on one foot and using considerable force with the other when he slipped and received severe injuries. His case is that his injuries were caused by a breach by the respondents of section 25 (1) of the Factories Act, 1937. That subsection provides: "All floors, steps, stairs, passages and gangways shall be "of sound construction and properly maintained." It is not alleged that the floor was not of sound construction, but it is said that, by reason of the presence of the oil which was a source of danger, the floor was not at the time of the accident properly maintained. It seems to me that the first question is whether the film of oil can be regarded as a part of the floor. There may be difficult cases where something has been put on a floor without being incorporated with it and where it could be regarded as part of the floor, but this is not one of those cases. The oil was on the floor casually and temporarily and seems to me to have been no more part of the floor than a banana skin dropped by a passer-by. The question then is whether section 25 (1) applies to things which are not part of the floor but whose presence on it is a source of danger. If section 25 stood alone I would say that it did not. No doubt the section is one dealing with safety, but, even so, keeping the surface of a floor free from dangerous material does not appear to me to come within the scope of maintaining the floor.

The difficulty in the case arises from the definition of the word "maintained" in section 152 (1). That section provides: "In "this Act, unless the context otherwise requires, the following "expressions have the meanings hereby assigned to them respec-"tively, that is to say:—. . . 'Maintained' means maintained "in an efficient state, in efficient working order, and in good "repair."

The word "maintained" occurs in many sections often in connexion with machinery. The whole definition can then be applied without difficulty. But, unless "working order" is used in a very loose way, which one does not expect in an Act of Parliament, to ask whether a floor is in efficient working order is to ask a meaningless question. It was not disputed that this part of the definition cannot be read into section 25 (1), and it was argued that because the context excludes this part of the definition it excludes the whole of the definition. I do not see why it should. I think that each part of the definition is severable. The phrase "in good repair" is clearly applicable to a floor, but this floor did not cease to be in good repair by reason of the presence of the oil on its surface. The difficulty arises with regard to the phrase "in an efficient state." "Efficient" is an awkward word to use in connexion with a floor, but I cannot reject it as meaningless. The appellant argues that a floor cannot be in an efficient state if people are liable to slip on it, but again I think one must ask whether the danger comes from the floor or from something which happens to be on it. It would be going a long way to say that a floor, perfectly good in itself, ceases to be in an efficient state whenever there is something on it which gives rise to danger. If there is any ambiguity one is entitled to look at the consequences of adopting each of the possible interpretations. It is one thing to say that an employer is absolutely responsible for the condition of his floors even if the unsafe condition has come about through no fault of his or his servants and could not have been remedied before the accident. But I would expect clearer words if it were intended that he should also be held responsible if something dangerous got on to his floor and made it for the time being "inefficient" through some inevitable accident or the fault of some other person not his servant.

But I do not think that there is really any ambiguity here. The requirement of the definition is not that the floor shall be in an efficient state; it is that the floor shall be maintained in an efficient state. "Maintained" is the dominant word throughout and that throws one back to what is meant by maintaining a floor. I see little difference between maintaining a floor "properly," as required by section 25, and maintaining it "in an efficient state" as required by the definition. I have already said that I do not think that maintaining a floor includes keeping dangerous things away from it. . . . .

To prevent misunderstanding I ought perhaps to add that maintaining a machine in efficient working order does, I think, involve preventing foreign matter from reaching any place where it can interfere with the proper working of the machine, and for that reason I cannot get much assistance in this case from *Galashiels Gas Co. Ld.* v. *Millar.*[2]

The appellant also alleges breach of the respondents' duty to him at common law. On that part of the case I agree entirely with the speech which my noble and learned friend, Lord Tucker, is about to deliver and which I have had an opportunity of reading. I therefore agree that this appeal should be dismissed.

LORD TUCKER. My Lords, as to the proper construction of section 25 (1) of the Factories Act, 1937, in the light of the definition of the word "maintained" in section 152 (1) of that Act, I am in agreement with the conclusion reached by the trial judge, the members of the Court of Appeal and your Lordships that it has not the wide meaning contended for by the appellant so as to render the respondents liable for the condition of the floor of this factory in the circumstances existing on August 31, 1950, and I do not desire to add anything on this part of the case. . . .

With regard to the alleged breach by the respondents of their common law duty to take reasonable care for the safety of their servants, I am in complete agreement with what was said by Singleton L.J. in the Court of Appeal in his application of the standard required to the facts as found by the trial judge. I only venture to add a few observations out of respect for the careful judgment of Pilcher J., and because it appears to me desirable in these days, when there are in existence so many statutes and statutory regulations imposing absolute obligations upon employers, that the courts should be vigilant to see that the common law duty owed by a master to his servants should not be gradually enlarged until it is barely distinguishable from his absolute statutory obligations.

[2] [1949] A.C. 275.

In the present case the respondents were faced with an unprecedented situation following a phenomenal rain storm. They set 40 men to work on cleaning up the factory when the flood subsided and used all the available supply of sawdust, which was approximately three tons. The judge has found that they took every step which could reasonably have been taken to deal with the conditions which prevailed before the night shift came on duty, and he has negatived every specific allegation of negligence as pleaded, but he has held the respondents liable because they did not close down the factory, or the part of the factory where the accident occurred, before the commencement of the night shift.

My Lords, I do not question that such a drastic step may be required on the part of a reasonably prudent employer if the peril to his employees is sufficiently grave, and to this extent it must always be a question of degree, but in my view there was no evidence in the present case which could justify a finding of negligence for failure on the part of the respondents to take this step. This question was never canvassed in evidence, nor was sufficient evidence given as to the condition of the factory as a whole to enable a satisfactory conclusion to be reached. The learned judge seems to have accepted the reasoning of counsel for the plaintiff to the effect that the floor was slippery, that slipperiness is a potential danger, that the defendants must be taken to have been aware of this, that in the circumstances nothing could have been done to remedy the slipperiness, that the defendants allowed work to proceed, that an accident due to slipperiness occurred, and that the defendants are therefore liable.

This is not the correct approach. The problem is perfectly simple. The only question was: Has it been proved that the floor was so slippery that, remedial steps not being possible, a reasonably prudent employer would have closed down the factory rather than allow his employees to run the risks involved in continuing work? The learned judge does not seem to me to have posed this question to himself, nor was there sufficient evidence before him to have justified an affirmative answer.

The absence of any evidence that anyone in the factory during the afternoon or night shift, other than the plaintiff, slipped or experienced any difficulty or that any complaint was made by or on behalf of the workers all points to the conclusion that the danger was in fact not such as to impose upon a reasonable employer the obligation placed upon the respondents by the trial judge.

I agree that the appeal be dismissed.

LORD ASQUITH OF BISHOPSTONE. My Lords, this appeal raises two points: (A) Are the defendants liable under the Factories Act, 1937? (B) Are they liable at common law for negligence? Of these the first point presents the greater difficulties.

A. The question is what the words "properly maintained" in section 25 (1) mean. The subsection provides that the "floors," inter alia, "shall be of sound construction and properly "maintained." If these words stood alone and there were no definition of the word "maintain" in the statute, for myself I should be in little doubt as to their interpretation. I should take them to mean that at the time of its construction or installation the floor should possess the structural qualities which a floor ought to possess—e.g., a level surface and sufficient strength to bear the stresses to which it is liable to be subjected—and that from that time on the owner of the factory should keep up, prolong or perpetuate that structural condition.

But the fact cannot be ignored that there is a definition of "maintain" in section 152 (1) and that this definition in part or in whole must be read into section 25 (1). There are three limbs in the definition. "Maintained" means maintained "in "an efficient state, in efficient working order, and in good "repair." This definition is capable of more than one construction.

(1) Mr. Croom-Johnson in an attractive argument contended that the three limbs of the definition should be read selectively or distributively, viz., that according to the subject-matter involved, all three limbs might apply, or some two of them or only one. Thus, in the case of a machine (e.g., a lift) there is no difficulty in applying all three. In the case, however, of a wholly and permanently passive entity such as a floor, he argued (and I think this was common ground) that "efficient working "order" was inapplicable, and, going further, that "efficient "state" was also inapposite, since "efficiency" connotes at the least potential activity or mobility, which a floor does not possess. Ergo, the words "in good repair" alone applied, and these words were fully satisfied by adequate repair of the structure.

(2) The respondents also argued that, short of this, the words "of sound construction" in section 25 (1) ran through and

coloured both the words "properly maintained" and the definition of "maintained." The second reason set out in the respondents' printed case formulates this contention as follows: "Because the definition of the word 'maintained' in section "152 (1) of the Factories Act, 1937, means, in relation to "section 25 (1) of the said Act, that it is the sound construction "which has to be maintained in an efficient state, in efficient "working order and in good repair." This argument accepts the applicability of all three limbs of the definition but treats their scope as controlled and narrowed throughout by the words "of "sound construction" at the opening of the substantive subsection.

(3) Or, again, section 25 (1) plus the definition may be read as imposing two independent and cumulative obligations: (a) to maintain the soundness of the floor's structure; (b) to maintain the floor in an efficient state not in respect of its structure only but over some wider range of qualities, which might include what has been called a "non-skid" quality in the surface.

It is somewhat tempting to solve these difficulties of construction by contenting oneself with the comparatively simple test on which Denning L.J.'s judgment mainly proceeds. He treats the duty of maintaining the soundness of the floor qua floor as absolute, but distinguishes between the floor itself and things, whether solid or liquid, superimposed on it, in respect of whose presence no absolute duty, in his view, exists but only a duty of reasonable care. You must maintain the floor, but it does not cease to be maintained because cumbered with things resting upon it. I do not dissent from this view, but it may be difficult to apply in practice in borderline cases. Where, e.g., a floor has polish so rubbed into it as to become absorbed and incorporated in its structure, are we dealing with a floor simpliciter, or a floor plus something superincumbent on it?

On the whole, I consider that the second of the three constructions outlined above is the most satisfactory, viz., that the words "of sound construction" control, colour or canalize the whole of section 25 (1) and the definition. The unreported decision of Hilbery J. in *Pitfield* v. *Railway Executive* [3] proceeds on this basis: and I can see nothing in *Galashiels Gas Co. Ld.* v. *Millar* [4] (which proceeded on section 22, a section with a different wording, and applied to a different subject-matter—a mobile object and a machine) which is inconsistent with it.

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[3] (1942) Winchester Assizes (Unrep.).

[4] [1949] A.C. 275.

On the point of construction, therefore, I am of opinion that the respondents succeed.

B. Negligence at common law. At common law the question can only be whether, having regard to the nature and extent of the risk created by the slippery patches on the floor, a reasonably careful employer would have suspended all work in this 15-acre factory and sent the night shift home: or whether, having done all he could (and did) do with the sawdust at his disposal, the 40 production service men in the afternoon, and the 24 volunteers between the end of the day shift and the beginning of the night shift, he would have allowed the work to proceed. The learned trial judge concluded that a reasonable employer would have closed down. I agree with practically everything else he said in a most careful judgment. But, of course, this conclusion was crucial. In considering it one cannot but be impressed by the following considerations: (a) it was nowhere specifically pleaded in the statement of claim that the works should have been closed down; (b) no witness for the plaintiff suggested that this should have been done; (c) no question was put to any witness for the defence to that effect; (d) no evidence was directed to the question, which on this issue was fundamental, what degree of dislocation or complication a complete stoppage would have entailed; (e) the point was first taken, after the evidence was closed, by the learned judge himself during the final speech of one of the counsel.

In these circumstances I agree with the observations of Singleton L.J.[5]: "If the test is, as I believe, what would a "reasonable employer have done in those circumstances, I fail "to see that the employers committed any breach of the duty "which they owed, and I fail to see, too, any evidence on which "to base a finding that the employers were negligent in not "closing down." What evidence the learned judge had before him suggests to my mind that the degree of risk was too small to justify, let alone require, closing down. The evidence of the plaintiff himself at p. 13C of the appendix to the case is that "you always get a certain amount of grease about." Ampstead, his fellow worker, says exactly the same at p. 28H, adding that on "numerous occasions" (four or five times) he had seen "mystic" well up from the channels in the floor of the factory owing to flooding. Yet the plaintiff says (at p. 15A) that except for the accident to himself on this occasion in August, he has never known any accident happen to anyone in the factory through these causes. I cannot resist the conclusion that on this occasion, notwithstanding the extent of the flooding, the risk was inconsiderable, and that the learned judge's conclusion cannot stand. Treated as a finding of fact, it cannot be supported on the evidence, which, as to the onerousness of the suggested remedial measure, was non-existent. Treated as an inference of fact, it was open to the Court of Appeal and is open to your Lordships' House to draw a different inference, and I would do so.

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[5] [1952] 2 Q.B. 701, 709; [1952] 1 T.L.R. 1349; [1952] 1 All E.R. 1302.

I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *Rowley Ashworth & Co.; Carpenters.*

[HOUSE OF LORDS.]

STAPLEY . . . . APPELLANT;
AND
GYPSUM MINES LD. . . . . . RESPONDENTS.

H. L. (E.)*
1953
Apr. 16, 21, 22, 23; *June* 25.

Negligence—Causation—Breach of statutory duty—Contributory negligence—Metalliferous mine—Order by foreman to two miners to fetch down insecure roof—Failure by miners to obey order—No report by miners to foreman—Resumption of normal work under roof by one miner—Death through fall of roof—Widow's action against employers—Apportionment of damages—Metalliferous Mines General Regulations, 1938 (*S.R. & O.* 1938, *No.* 630, *as amended by S.R. & O.* 1945, *No.* 1351), *regs.* 7 (3), 14 (1) *and* (7) *and* 15 (1) (2) (3) *and* (10)*—Law Reform (Contributory Negligence) Act,* 1945 (8 & 9 *Geo.* 6, *c.* 28), *s.* 1.

Two miners of equal status, S., a breaker, and D., a borer, worked in the respondents' gypsum mine and were employed by them, neither being in charge of the other. At their working place they found indications that the roof was dangerous and might fall and told the foreman, who instructed them to fetch it down, which they understood as including the corollary that they were not to do ordinary work under the roof until it had been made safe. After he had left them they tried unsuccessfully to get the roof down and then, by a joint decision, abandoned the effort and proceeded with their normal work. The roof fell and S. was killed.

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* *Present*: LORD PORTER, LORD OAKSEY, LORD REID, LORD TUCKER, and LORD ASQUITH OF BISHOPSTONE.

The widow of S. sued his employers for damages in respect of his death (a) under the Fatal Accidents Act, (b) on the ground of negligence and (c) on the ground of breach of statutory duty under the Metalliferous Mines General Regulations, 1938, as amended. The trial judge found that the actions of both men were causes of the death, through failure to obey the foreman and to report the fact to him and through the joint decision to continue to work under the roof; he also found that the foreman was justified in leaving them to carry out the order, for which they were competent, and that there was no lack of proper supervision. Accordingly he gave judgment for the widow against the respondents as employers of D., for one half of the amount which he would have been awarded if S. had not been also responsible for his own death. The Court of Appeal reversed that decision, holding that any negligence and breach of the regulations by D. did not cause or contribute to the death of S., the real cause of which was his own negligence and breach of statutory duty:—

Held (*per* Lord Oaksey, Lord Reid and Lord Tucker; Lord Porter and Lord Asquith of Bishopstone dissenting) that D.'s fault, for which his employers were liable, was a contributory cause of the accident which resulted in the death of S.

Admiralty Commissioners v. *Volute* (*Owners*) [1922] 1 A.C. 129, 144–5; 38 T.L.R. 225, applied.

In terms of the Law Reform (Contributory Negligence) Act, 1945, s. 1, the damages awarded should be reduced by 80 per cent., having regard to the share of S. in the responsibility for the damage; S. was 80 per cent. to blame and D. 20 per cent.

Decision of the Court of Appeal [1952] 2 Q.B. 575; [1952] 1 All E.R. 1092, reversed.

APPEAL from the Court of Appeal (Singleton, Birkett and Morris L.JJ.).

This was an appeal from an order of the Court of Appeal dated April 7, 1952, allowing an appeal by the respondents, Gypsum Mines Ld., from a judgment of Sellers J. given on December 20, 1951, on the trial of the action at the Sussex Assizes. An appeal by the appellant Mrs. Seagull Gladys Stapley, widow, from that judgment was dismissed by a further order of the same date. The action was tried on December 10, 11, 13 and 20, 1951. The appellant was plaintiff and the respondents were defendants. By the judgment of Sellers J. she was awarded £1,512 10s. 0d. damages in respect of her husband's death as a result of the negligence and breach of statutory duty of the respondents, the amount of the damages being reduced by half on the ground of the negligence of the deceased.

The respondents appealed from the judgment of Sellers J.

by notice of appeal dated January 10, 1952, and the appellant appealed from part of that judgment by notice of appeal dated January 24, 1952. The appellant's appeal concerned the question of negligence on the part of her husband and only related to the quantum of damages. The respondents asked for the judgment to be wholly set aside and judgment to be entered in their favour. The Court of Appeal allowed the appeal of the respondents and dismissed the appeal of the appellant, who appealed to the House of Lords. She petitioned only that the judgment of Sellers J. be restored.

The facts are fully stated in their Lordships' opinions. The relevant provisions of the Metalliferous Mines General Regulations, 1938, are set out in Lord Porter's opinion.

Beney Q.C. and *Jukes* for the appellant. The decision of the Court of Appeal can only be supported on one of three grounds: (a) that because Stapley's misconduct was enough by itself to cause his death there is no need to consider whether Dale's misconduct was also a cause of it; or (b) that Dale's misconduct was not a cause of it; or (c) that Stapley was volens the risk of Dale's misconduct.

As to (c), no question of volenti non fit injuria arises here, since the joint decision of the two men did not amount to an agreement. Nor was this point raised at any time in the courts below, nor is it raised in the respondents' case.

As to (a). This is a point of law. It is clear that more than one cause can bring about a certain result even though each cause by itself could have done so. If this is the case there is no duty on the court to select one cause rather than another. The abolition of the doctrine of common employment renders the master liable to a fellow servant of the negligent employee if that negligence was in the course of his employment.

As to (b). This is a mixed question of law and fact; given a proper direction to a jury the matter would be one for them. The trial judge directed himself correctly in that he considered whether the acts of both men were so closely connected together that each contributed to cause the accident, and he decided as a fact that they did. Such a question could not be withdrawn from the jury and a finding of fact on such a point should not be disturbed by an appellate court. The questions could be asked: (1) What caused Stapley's death? Answer—the fall of roof. (2) Why did the roof fall? Answer—because neither man obeyed the foreman's orders to get it down; further each man was in disobedience of that order up to the moment when the fall occurred. The contributory negligence of the deceased himself, contributing to his own death, is a partial defence, not a complete defence, and the liability is apportioned.

Dale, an employee, acting in the course of his employment, was guilty of negligence at common law in failing to carry out the foreman's instructions, the common law duty being that resting on the employers to use all due care for the safety of their employees. He was also guilty of a breach of statutory duty under the Metalliferous Mines General Regulations, 1938, as amended, regulations 7 (3) and 15 (1). Dale and Stapley were both under a duty to obey the foreman's orders and the said statutory duty to make the roof secure; and failure by either of them to do so was a breach of duty in the course of their employment by the respondents for which the respondents are responsible. Furthermore, the duty imposed thereby to make the roof secure was an absolute duty and the employers failed to fulfil it, although without personal fault on their part.

Regulation 7 (3) imposed an absolute duty on the employers, and in the face of it they could not perform the duties imposed on them by regulation 14 (1) by giving instructions, through the foreman, to these two men to get the roof down. Since the roof was not brought down they were in breach of their duty under regulation 7 (3) to make the working place secure. *Lochgelly Iron and Coal Co. Ld.* v. *M'Mullan* [1] supports the view that an absolute obligation was imposed. Apart from *Smith* v. *A. Baveystock & Co. Ld.*,[2] nothing even colourably supports the opposite view, and that case was distinguished in *Cakebread* v. *Hopping Brothers (Whetstone) Ld.*[3] As to statutory duty, see also *Norris* v. *Syndic Manufacturing Co.*[4]

Dale failed to carry out the order to bring the roof down, and his failure continued right up to the time when it fell. If he had decided to carry out the order and sent for the shot-firer there would have been no question of any breach of duty by either man, for the death caused by the fall of the roof would not have occurred. If Dale had bored the shot-holes Stapley would probably have waited for the shot-firer to come before entering the stope. As to the question of causation, see Munkman on Employers' Liability, 2nd ed., p. 40; *Weld-Blundell*

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[1] [1934] A.C. 1; 49 T.L.R. 566.

[2] [1945] 1 All E.R. 531.

[3] [1947] K.B. 641; 63 T.L.R. 277; [1947] 1 All E.R. 389.

[4] [1952] 2 Q.B. 135; [1952] 1 T.L.R. 858; [1952] 1 All E.R. 935.

v. *Stephens*[5]; *Davies* v. *Swan Motor Co. (Swansea) Ld.*,[6] approved in *Nance* v. *British Columbia Electric Railway Co. Ld.*[7]; *Harvey* v. *Road Haulage Executive*[8]; *Flower* v. *Ebbw Vale Steel, Iron and Coal Co. Ld.*[9]; *Caswell* v. *Powell Duffryn Associated Collieries Ld.*[10]; *Jones* v. *Livox Quarries Ld.*[11]; *Smith* v. *Chesterfield and District Co-operative Society Ld.*[12]; *Henley* v. *Cameron.*[13]

Even if the negligence of Dale was neither greater nor less in quantity and quality than that of the deceased, the Law Reform (Contributory Negligence) Act, 1945, is not excluded. That Act should be read in the light of the Maritime Conventions Act, 1911, s. 1 (1). It would be astonishing if, where the negligence of one person (Dale) was sufficient to account for the accident, the operation of the Act was excluded because the fault of both that person and the injured person caused or contributed to the whole damage.

As to the apportionment of the damages, the reasoning of Sellers J. was satisfactory and his decision should not have been set aside. There was nothing wrong with his findings of fact. He found that the real fault bringing about the accident was the conduct of both men in failing to do what the foreman had told them to do, or reporting to him that they could not do it, and deciding to continue their work in that state of affairs. Sellers J. therefore was justified in regarding them as equally to blame. Culpability is the primary matter to be considered, assessing how much each man was to blame. The overriding factor is blameworthiness: *British Fame (Owners)* v. *Macgregor (Owners)*[14] and *Beal* v. *E. Gomme Ld.*[15]

Lamb Q.C. and *Friend* for the respondent company. Two men of equal status, neither being in charge of the other, were working in a mine to which the Metalliferous Mines General Regulations, 1938, applied. The owners were responsible for the safety of their employees at common law and also for observing the regulations. The two men were responsible for their own safety in the sense that they had to take reasonable care in the conduct of their work and also that they had to observe the regulations in so far as they related to employees in the mine. The employers employed a competent foreman empowered to give orders to the two men, who were under a duty to obey his lawful orders. At the beginning of the afternoon shift the men had noticed that part of the roof was unsafe and had reported it to the foreman. In gypsum mines the men habitually tap the roof as they go along, because there are loose places in it. The foreman gave the men a lawful order to get the roof down and not to work under it until they had got it down. They were competent men who needed no supervision. Having tried for half an hour to get the roof down and failed, they decided to leave it and to go on working, thinking that it was safe. The deceased was working under that dangerous roof and after a period it fell and killed him.

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[5] [1920] A.C. 956, 973, 983; 36 T.L.R. 640.

[6] [1949] 2 K.B. 291, 322; 65 T.L.R. 278; [1949] 1 All E.R. 620.

[7] [1951] A.C. 601; [1951] 2 T.L.R. 137; [1951] 2 All E.R. 448.

[8] [1952] 1 K.B. 120.

[9] [1934] 2 K.B. 132.

[10] [1940] A.C. 152; 55 T.L.R. 1004; [1939] 3 All E.R. 722.

[11] [1952] 2 Q.B. 608, 615; [1952] 1 T.L.R. 1377.

[12] [1953] 1 W.L.R. 370; [1953] 1 All E.R. 447.

[13] 65 T.L.R. 17.

[14] [1943] A.C. 197; 59 T.L.R. 61; [1943] 1 All E.R. 33.

[15] 65 T.L.R. 543.

The regulations as a whole are general safety provisions, the purpose of which is to ensure the safety of persons working in the mine. The duty imposed by them is only absolute when there are persons working in the mine. Thus, it would be no breach of the regulations if the owners shut up the mine and let it become unsafe. There is no breach of the regulations unless the men are exposed to danger by a failure to observe them.

The effective cause of this accident was the deceased's own negligence or breach of statutory duty, his disobedience to a lawful order and his decision to work in a place which he knew to be unsafe. Only if this contention of the respondent company were rejected would it become necessary to consider the Act of 1945. Under that Act the damage suffered must be the result of negligence or breach of statutory duty (see section 4), being partly his own fault and partly that of another person (see section 1). There is no reason for that Act to be applied in the present case, because before it can apply there must be damage resulting partly from the man's own fault and partly from the fault of another, and here the effective cause of the accident was the fault of the deceased himself in disobeying the foreman's order and going under the roof. It is said for the appellant that because Dale, a servant of the respondent company, failed to bring down the roof or to report the men's inability to do so, the respondent company is liable. But the deceased also failed to do these things, and neither man was in authority over the other. The respondent company are not liable for the damage occurring in a place where the men were told not to work. As to causation, see *Anglo-Newfoundland Development Co. Ld.* v. *Pacific Steam Navigation*

Co.[16]; *Radley* v. *London and North-Western Railway Co.*[17]; *Leyland Shipping Co. Ld.* v. *Norwich Union Fire Insurance Society Ld.*[18]; *Boy Andrew* (*Owners*) v. *St. Rognvald* (*Owners*).[19] *Smith* v. *Chesterfield and District Co-operative Society Ld.*[20] has no bearing on this case and is distinguishable.

On the five main points of the case, the first question is: was Dale negligent? It is admitted that he was careless and negligent in not obeying the foreman's order, and that he was committing a breach of regulation 15 (1), which places a duty on employed persons and not on the mineowners. He was also in breach of regulation 15 (10). These were the only breaches of the regulations. On the second question, there was no breach of regulation 7 (3), because "working place" therein means a place where men are required to work and not merely a place where they in fact choose to work. There is no breach of this regulation if a place where they are forbidden to work is unsafe. Thus, these men were not working in a working place which had not been made secure. The employers did everything necessary not to be in breach of this regulation. On the third question, the negligence of the deceased was the direct cause of his injury. On the fourth question, whether, if the negligence of Dale was neither in quality nor quantity greater nor less than that of the deceased, the Act of 1945 was excluded, the answer is that if the deceased were alive and were suing Dale in respect of injuries received he would be in the difficulty that he could not prove that it was Dale's error of omission rather than his own which caused them. The Act would not be ipso facto excluded, but if the injured man's share of responsibility amounts to a totality there is nothing to apportion. If the responsibility here is wholly on the shoulders of the deceased, it is not a share.

On the fifth question, whether the apportionment should be interfered with, if there was any fault on the part of Dale for which the employers can be held vicariously responsible, the deceased's share of responsibility for his own death was such that the damages awarded by the judge should be reduced. The House is free to vary his apportionment. He did not give due weight to the fact that the deceased was the man who went back to this dangerous place. As to the meaning of the word "responsibility" in the Act of 1945, it is to be noted that the Maritime Conventions

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[16] [1924] A.C. 406.

[17] (1876) 1 App.Cas. 754.

[18] [1918] A.C. 350, 368; 34 T.L.R. 221.

[19] [1948] A.C. 140, 146, 154–5; [1947] 2 All E.R. 350.

[20] [1953] 1 W.L.R. 370.

Act, 1911, uses different phraseology referring to different degrees of fault. The question under the Act of 1945 is: how much damage is the plaintiff responsible for? Culpability does not enter into it, and the matter is not to be judged from the point of view of morality. If a drunken driver drove his car without lights all over the Embankment late at night when it was empty, and a person coming out of the Temple chose to walk in front of it when it was five yards away, the driver's culpability would be of the highest, but the walker's own act would be the true cause of the accident. By the Act the question is left entirely at large. The words in section 1, "shall be reduced to such an extent as "the court thinks just and equitable," import that there can be no rule. It is sought to make the employers vicariously liable for what Dale did not do. They themselves neither did nor omitted to do anything in breach of the regulations. The deceased was in breach of the regulations in many respects and his damages should be reduced to a very small proportion if they are not extinguished altogether.

Beney Q.C., in reply. As to the question of apportionment of damages, it is to be inferred that in *Smith* v. *Chesterfield and District Co-operative Society Ld.*[21] Lord Goddard C.J. had culpability in mind. The Act of 1945 entrusts a large discretion to the court, and the matter is not to be looked at narrowly and rigidly. It was a mere chance that the deceased happened to be under the roof; it might have been Dale. The deceased was a good workman, closely associated with Dale, and there is no evidence that they differed from each other. The real fault was the conduct of them both. In apportioning the responsibility the negligence of Dale is more important than the breach of regulation 7 (3).

As to causation, cases have been cited, but this is primarily a question of fact. The proper question to put in directing a jury would have been: what was the true and substantial cause of the injury? see *Grant* v. *Sun Shipping Co. Ld.*[22] and *The Volute.*[23] One must consider whether, if Dale had carried out his duty, it is probable that the accident would not have occurred. If he had gone for the shot-firer it is unlikely, judging by the character of the deceased, that he would have gone on working, for he was an experienced man.

Their Lordships took time for consideration.

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[21] [1953] 1 W.L.R. 370.

[22] [1948] A.C. 549, 564; [1948] 2 All E.R. 238.

[23] [1922] 1 A.C. 129; 38 T.L.R. 225.

June 25. LORD PORTER. My Lords, this appeal is brought by Mrs. Seagull Gladys Stapley, the widow of Mr. John Sydney Stapley, against a decision of the Court of Appeal which held that her action failed. Before Sellers J. she had succeeded in recovering £1,512 10s., being half the damages of £3,025 which that learned judge found she had sustained from the death of her husband.

Mr. Stapley was employed by the respondents as a breaker in their gypsum mine, and part of his duty was to break up gypsum rock, which had been blasted by a previous shift of workers, in order that it might be removed by scraper haulage from the spot where it lay. The circumstances giving rise to her claim are not in dispute and can be shortly stated.

At about 4.15 p.m. on August 21, 1950, John Sydney Stapley and one Dale, in the course of their employment by the respondents, were underground in No. 9 stope at the respondents' gypsum mine in the county of Sussex. John Sydney Stapley was a breaker and Dale a borer, which was a slightly more skilled task than that of breaker, but the two men were of equal status. Neither was in control of or entitled to give orders to the other. The task of John Sydney Stapley was to break up gypsum with a pick or a drill to a size convenient for removal, and Dale's task was to prepare the stope in order that a scraper hauler could be installed in it to facilitate the removal of the gypsum. When they were about to commence work in the stope they both observed that the roof was unsafe and likely to fall, a condition which is of frequent occurrence in this class of mine, and particularly so in the stope in question because a fault in the rock formation ran diagonally across its entrance. While the two men were in the stope and before they had commenced work the respondents' foreman, Church, in the course of his regulation routine round of the mine, came to the entrance of the stope, saw Stapley and Dale and was informed by them of the condition of the roof. He there and then instructed them both to bring it down so as to render the position safe for work.

The task of bringing down the roof was one which was understood by both men and was one within their capacity to perform without supervision. Moreover, they were both well aware that such an order meant that they were not to work in the stope until they had got the roof down. There were three methods by which that task could have been accomplished, all of which were well known to both, namely, with picks, with pinch bars or by boring holes in the roof and then summoning the shot-firer to blast it down.

Church left Stapley and Dale after he had instructed them to bring down the roof, it being unnecessary either for him or anyone else to be present to supervise them whilst they performed this duty. For a period of approximately half an hour they attempted to perform their task, restricting themselves to the use of picks. They might possibly have used pinch bars and certainly might have resorted to boring and shot-firing but, having failed to bring down the roof with picks, they decided to disregard the instructions of their foreman and to return to their respective duties of breaker and borer. Having made this decision, Dale went to perform his duties in the twitten near No. 9 stope, leaving Stapley to work in the stope itself under the roof which they had been ordered to bring down and which they both knew had shown signs of danger but believed to be safe enough. A short time after they had abandoned their attempts to bring down the roof and had commenced their respective work, Dale returned to No. 9 stope, and found Stapley buried beneath a quantity of gypsum which had fallen from the roof and killed him.

The liability sought to be placed upon the respondents was based on common law and upon a breach of the provisions of regulations 7 (3) and 14 (5) of the Metalliferous Mines General Regulations, 1938 (S.R. & O. 1938, No. 630, as amended by S.R. & O. 1945, No. 1351) made under section 86 of the Coal Mines Act, 1911, and applied to metalliferous mines by the Mining Industry Act, 1920. Certain others of the regulations were relied upon as having some bearing on the point at issue and are accordingly inserted here:—

Regulation 7 (3). "The roof and sides of every travelling "road, outlet and working place shall be made secure, and no "person, unless engaged in repairing or in investigating the safety "of the workings shall travel on or work in any travelling road "or working place which is not so made secure."

Regulation 14. "(1) The owner or agent shall carry out the "provisions of the Acts, the Regulations, and the special rules "and to the best of his power enforce the observance thereof, and "he shall give such directions as may be necessary to ensure "compliance with those provisions and to secure the safety of "the mine, and the safety, health and proper discipline of the "persons employed. . . . (5) The owner or agent, or an official "appointed in writing by him for the purpose, shall—(*a*) During "every ordinary mineral-getting shift, inspect every working "place and road in every part of the mine in which persons work "or along which they have to pass . . . ; every dangerous place "shall be fenced off, or, if this is not practicable, adequate "warning shall be given so that such place shall not be inadvertently entered by any person. . . . (7) If any danger is "revealed by the examination or inspection, steps shall be taken "at once to remove it and except for that purpose any person "exposed to the danger shall be withdrawn."

Regulation 15. "(1) Every person employed at the mine "shall comply with the provisions of the Acts, the Regulations "and the special rules and any regulations made by the owner "or agent in pursuance thereof and with such directions con-"cerning safety and discipline as may be given to him by those "in authority over him. (2) Every workman employed in the "mine shall, before commencing work, and during the course of "it, especially after blasting, make a careful examination of his "working place, and so far as practicable remove any or secure "any loose rock, stones or ground which might be dangerous. "(3) Every person employed at the mine who notices anything "that appears unsafe, or likely to cause danger, shall remedy the "matter if it is within the scope of his duty, and if not shall "withdraw forthwith from the place of danger and report the "matter to the owner, agent, or other responsible official. . . . "(10) No person shall negligently or wilfully do anything likely "to endanger life or limb in the mine, or negligently or wilfully "omit to do anything necessary for the safety of the mine or of "the persons employed therein."

Both grounds of claim were forcibly argued before your Lordships' House based in each case substantially upon the same facts and reasoning. So far as the statute was concerned it was submitted that the duty under regulation 7 (3) to make the roof and sides of the working place secure was an absolute one, that the respondents had failed to do so, albeit through no personal fault of their own, but they had not fulfilled the requirements of the regulation though they had taken all usual or indeed all possible steps to comply with their obligations. It is true, the appellant admitted, that contributory negligence was a defence in part to such a claim, and it was conceded that Stapley was himself negligent and in part the author of his own death. But Dale, it was urged, was also negligent; he also had failed to carry out his owners' orders and was in breach of regulation 15 (1), (2), (3) and (10). The respondents as employers, it was submitted, were responsible for the negligence or neglect of duty of their employees, of whom Dale was one. Dale's action was, it was said, at any rate in part the cause for Stapley's death, and now that the doctrine of common employment has been abrogated and contributory negligence is no longer a complete defence, Dale's employers are affected by Dale's breach and must pay the penalty in so far as his fault contributed to the disaster. This view, as I understand it, was that which appealed to the learned judge, and he based his decision on it without distinguishing between a common law and a statutory liability.

My Lords, a number of alleged acts of negligence were inserted in the statement of claim, but all save two were disposed of by the learned judge and are not now relied upon. The two remaining are that the defendant "failed to make the said roof "of the said stope or working place secure, contrary to regulation "7 (3) of the said regulations," and (by amendment) that "the "said Dale their servant failed to bring down the said roof by "firing or boring holes for firing and/or failed to report to the "said Church his inability to bring down the said roof." It was upon those allegations, which he found to be proved, that Sellers J. held the respondents liable. As, in his view, however, Stapley was in part to blame for the accident, he deducted one half of the award which he would otherwise have given. The appellant now accepts the decision of Sellers J. and does not seek to disturb his finding that Stapley's own act contributed to his death or the apportionment consequent thereon. The Court of Appeal agreed that the respondents were in breach of their statutory duty in that they had not fulfilled the obligation imposed on them by regulation 7 (3) of keeping the roof secure and that that duty was absolute. They also, like Sellers J., were of opinion that both men had failed to carry out the orders of their foreman, Church, and therefore had broken the statutory obligation imposed by regulation 15 (1), (2), (3) and (10). Once those findings are accepted it is to my mind unnecessary to consider whether either masters or men had neglected any of the other duties which the statute enjoined. They were in breach and it could make no difference whether the breach was less or greater, except possibly to the extent to which the blame was distributed and the amount to be deducted from the appellant's award.

All the members of the Court of Appeal, however, absolved the respondents from liability, but so far as I am able to judge not wholly on the same grounds. It was said on the one hand that the obligation placed upon Stapley and Dale was a joint obligation and each was wholly to blame for neglecting to carry

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it out. One can set out the proposition in the words of Birkett L.J. He says [1]: "There is no doubt that in this case "the men were charged with the statutory duty jointly, and "the judge so finds. Whatever may be attributed to Dale by "way of breach of duty can be attributed to Stapley with equal "force. If Stapley had not failed in his statutory duty the "'drummy' roof would have been brought down whatever Dale "did or did not do. Why, then, because one of the two men "is killed should the breach of duty be attributed to Dale, the "survivor, in order to make the employers liable? It was a "joint duty, not the duty of Dale alone; but by the amendment "the judge indicated that he was deciding the case as though "Stapley had nothing to do with the breach of duty that resulted "in the 'drummy' roof being left without being brought down, "though he recognised that Stapley was equally to blame.

"The two men had mutually agreed to disobey the orders of "Church, and in so doing committed offences against the Metalliferous Mines Regulation Acts of 1872 and 1875, punishable "by fine and imprisonment. It seems to me to be impossible "to say that the employers were guilty of a breach of statutory "duty because of the default of Dale, without saying in the "same breath that they were at the same time guilty of the "same breach because of the default of Stapley."

The other ground was that the cause of the death was, in the legal sense, the resumption of work by Stapley under the "drummy" roof. Again the Lord Justice says [2]: "But I "think this appeal can be decided on another ground. It seems "clear that if the inquiry to be made is: What was the cause "of Stapley's death? then the answer must be that it was his "own breach of duty in resuming work under the 'drummy' "roof. If he had not done that, it is obvious that he would "not have been killed."

Singleton and Morris L.JJ. appear, on the other hand, to rely mainly on the first of the two reasons.

My Lords, I find the first ground elusive and difficult. It may be that in some future case your Lordships will be confronted with the difficulty of finding a solution.

For myself I am content to say that I agree with the judgment of the Court of Appeal upon the second point. The cause of Stapley's death, to my mind, was brought about by his own return to the stope.

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[1] [1952] 2 Q.B. 575, 591; [1952] 1 All E.R. 1092.

[2] [1952] 2 Q.B. 575, 592.

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Causation is always a difficult topic. One is but using a commonplace if one repeats that many causes have some place in the sequence of events which lead to a result, or follows Lord Shaw in saying that " causation is not a chain, but a net ": *Leyland Shipping Co. Ld.* v. *Norwich Union Fire Insurance Society Ld.*[3] The question always is how far back is one justified in going or how wide a net must one envisage. In the present case both men, it is true, neglected their duty, and it is said that they agreed to do so. The exact meaning of what their agreement amounted to has never been inquired into or elucidated. For my own part I agree with Morris L.J. when he says[4]: " I do not consider " that their ' agreement ' should be considered as denoting more " than their concurrence in a joint decision to abandon their " duty to make the roof secure." Each, in my view, after discussing the matter with the other, went his own way and returned to his own work. If I did not hold this opinion a further question might require consideration, viz., whether Stapley in agreeing that Dale should return to his work and leave the appointed task undone was not to that extent also the victim of his own negligence so that his and not Dale's act was the cause of his death.

It was urged that if Dale had insisted on continuing the work or had started to bore holes for shot-firing Stapley would have followed his lead. It may be so; but such a conclusion is at best speculative, and in any case it was not Dale's place to command or persuade his comrade to do his duty.

The more forcible argument is to say that Stapley's death was caused by the fall of the roof, that that fall would not have occurred if Dale had either bored the roof for shot-firing and obtained the assistance of a shot-firer or reported again to Church. It may indeed be said that historically the fall of the roof was a cause of the accident, but though it was *a* cause, yet, in my opinion, it was not, in a legal sense, *the* cause. The result was brought about by Stapley's own act, and for that act his employers are not liable.

My Lords, a number of authorities were brought to your Lordships' attention, I think for two purposes: (1) to show that the duty of the respondents under regulation 7 (3) was an absolute one and (2) to direct your Lordships' minds to the relevant approach to matters of causation.

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[3] [1918] A.C. 350, 369; 34 T.L.R. 221.

[4] [1952] 2 Q.B. 575, 600.

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For my own part, I do not find myself much helped in this way. In the first place, I am content, for the purpose of this case, to assume without deciding that the employers' duty under regulation 7 (3) is absolute, and such an assumption does not conflict with my view as to what the result of the case should be. In the second place, one example of what has been deemed to be the cause of an event is but of slight assistance to the true view in other and different circumstances. I agree, indeed, with the opinion which has been commonly held since the decision of *Admiralty Commissioners* v. *Volute (Owners)*,[5] viz., that the abolition of the rule that any contributory negligence, however small, on the part of a plaintiff defeated his claim, has no effect upon causation. It enables the court (be it judge or jury) to seek less strenuously to find some ground for holding the plaintiff free from blame or for reaching the conclusion that his negligence played no part in the ensuing accident inasmuch as owing to the change in the law the blame can now be apportioned equitably between the two parties.

What was the cause of an event, however, leads to an inquiry of the same nature as existed before the change.

I should add that if I took the view which commended itself to the learned judge I should nevertheless think the proportions in which he divided the blame attributed far too much to Dale. If I were left to myself I should place it at an infinitesimal quantity, but if the matter becomes material I should not think it necessary to dissent from an allowance to the representatives of the deceased man of 20 per cent. of the total damage, i.e., £605.

LORD OAKSEY. My Lords, the only question which was decided in the courts below and the only question fully argued before your Lordships was whether the breach of duty by Dale was causally connected with the death of the plaintiff's husband Stapley. The doctrine of common employment having been abolished, there is no doubt that the respondents are liable for Dale's negligence if it was causally connected with Stapley's death. Dale's negligence was not disputed, but it was argued that Stapley's death was not in any way a result of Dale's negligence.

Dale and Stapley were ordered to "fetch the roof down," and they understood that order to mean, "Do not work under it until "you have got it down." But notwithstanding these orders, after attempts to get the roof down for about half an hour, they decided, after discussion together, that it was safe and that they would go on with their ordinary work. As Dale was a borer and Stapley a breaker, Dale's work took him away from the place in the mine where they had been trying to get the roof down, and Stapley's work took him to that place. There was no suggestion that Dale went where he did because of the order or to report the matter or to make any further effort to get the roof down. But it is argued that because the roof fell while Stapley was under it and Dale was not, Stapley's presence alone was the cause of his death. In my opinion they were both equally disobeying an order which applied to each of them and in so doing they were both equally in breach of their duty.

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[5] [1922] 1 A.C. 129; 38 T.L.R. 225.

Dale's disobedience continued up to the moment of Stapley's death, and I agree with Sellers J. that Stapley's death was a result of their decision not to continue their efforts to get the roof down; a decision which was just as much Dale's decision as Stapley's. As Viscount Birkenhead L.C. said in *Admiralty Commissioners* v. *Volute (Owners)*,[6] " . . . the question of contributory negligence " must be dealt with somewhat broadly and upon common-sense " principles as a jury would probably deal with it. And while no " doubt, where a clear line can be drawn, the subsequent negli- " gence is the only one to look to, there are cases in which the two " acts come so closely together, and the second act of negligence " is so much mixed up with the state of things brought about by " the first act, that the party secondly negligent . . . might, on " the other hand, invoke the prior negligence as being part of the " cause of the collision so as to make it a case of contribution." The learned Lord Chancellor was there dealing with acts of negligence which were not synchronous, but in the present case the breach of duty by Dale was synchronous with the breach of duty by Stapley and continued up to the moment of Stapley's death, and it seems to me, looking at the matter broadly and upon common-sense principles, impossible to say that the acts of Dale and Stapley did not " come so closely together and were not so " closely mixed up " that Dale's breach of duty could be regarded as not being part of the cause of Stapley's death.

Morris L.J. was apparently of the opinion that because they agreed to disobey the order and because neither was in a position of authority over the other the negligence was joint, and that Dale's negligence could not have been asserted by Stapley if he had lived or by his widow in the circumstances of his death. With

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[6] [1922] 1 A.C. 129, 144.

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the greatest respect for the Lord Justice's opinion, I cannot follow his reasoning. The doctrines of common employment and of contributory negligence having been abolished, the only question is whether, under the Law Reform (Contributory Negligence) Act, 1945, Stapley's death was " the result partly of his own fault and " partly of the fault of " Dale, for whose fault the respondents are responsible. It follows, in my opinion, that Stapley, if he had lived, could have asserted as against the respondents that Dale's breach of duty had contributed to the accident, and that his widow can do likewise in the circumstances of his death.

Each man was responsible for disobeying the order and, in my opinion, it is quite uncertain whether Stapley would have acted as he did had not Dale agreed that the roof was safe and that they should go on with their ordinary work.

I think the matter may be tested by considering a case of conspiracy. If an agreement to commit an unlawful act is sufficiently causally connected with the unlawful act to be criminal, how can it be said that an agreement to commit a breach of duty is not causally connected with the consequences to either party of that breach of duty?

For these reasons, my Lords, I am of opinion that the judgment of Sellers J. was right and ought to be restored on the question of liability. I am not at all certain that I should not have decided the apportionment in the same way as the learned judge did, but in view of your Lordships' view that the apportionment should be varied, I am not prepared to dissent.

LORD REID. My Lords, in the respondents' mine the workings are driven at right angles away from the main haulage way: the actual working place is the stope and the part between it and the haulage way is the twitten. The miners all work in pairs, one being the borer and the other the breaker. There is no sharp demarcation between their work and neither can give orders to the other, though the borer appears to be the senior man. Before the accident, Stapley and Dale were working together, Stapley being the breaker. He was a steady workman with long experience but rather slow. He had for a time been a borer but had reverted to being a breaker.

A well-recognised danger in the mine is a fall of part of the roof. The roof is not generally shored up, as any weakness in it can be detected by tapping it: if it is " drummy," giving a hollow sound, it is unsafe and must be taken down. There are three ways of doing this—with a pick, or with a pinch bar or crow bar, or by firing a shot. Whichever way is adopted, of course, men doing the necessary work must not stand immediately below the dangerous part of the roof.

One morning when Stapley and Dale arrived at their stope they tested the roof and found it to be drummy. They saw the foreman Church about it, and he ordered them to fetch it down. They all knew that that meant that no one was to work under the roof before it had come down. Church did not say which method was to be adopted: both men were accustomed to this work and the method was properly left to their discretion. They used picks, but after half an hour had made no impression. The work was awkwardly placed, as a fault ran across the mouth of the stope, the floor and roof inside being about eighteen inches higher than outside it. Probably they could not use a pinch bar, but they could easily have prepared the place for firing a shot and sent for the shot-firer. Instead, according to Dale, whose evidence was accepted, they agreed that the roof was safe enough for them to resume their ordinary work, and did so. There was a quantity of gypsum lying in the stope, and if the roof had been safe their first task would have been to get this to the haulage way: to do that Stapley had to enter the stope and break the gypsum into smaller pieces and Dale had to make preparations in the twitten. So they separated, and when Dale came back half an hour later he found Stapley lying dead in the stope under a large piece of the roof which had fallen on him.

There is no doubt that if these men had obeyed their orders the accident would not have happened. Both acted in breach of orders and in breach of safety regulations, and both ought to have known quite well that it was dangerous for Stapley to enter the stope. The present action against the respondents is chiefly based on Dale's fault having contributed to the accident and on the respondents being responsible for it, the defence of common employment being no longer available. So it is necessary to consider what would have happened if Dale had done his duty. It was his duty either to try a pinch bar or to start boring holes for the shot-firer, and on the evidence I think that it is highly probable that, if he had insisted on doing that instead of agreeing with Stapley to neglect their orders and the regulations, Stapley would not have stood out against him or tried to resume his ordinary work. Stapley had nothing to gain from his disobedience, and if he had not found Dale in agreement with him it appears to me unlikely that he would have persisted. But if he had persisted and thereby prevented Dale from carrying out his orders—because Dale could not have worked at the roof if Stapley had persisted in going below it—then it was Dale's duty to go for the foreman, as he, Dale, could not give orders to Stapley. We do not know how soon the roof fell or how long it would have taken Dale to find and bring the foreman, but it is at least quite likely that the foreman would have arrived in time to prevent the accident. If Dale's failure did contribute to the accident, then I do not see on what ground the respondents can escape liability in respect of that failure.

In these circumstances it is necessary to determine what caused the death of Stapley. If it was caused solely by his own fault, then the appellant cannot succeed. But if it was caused partly by his own fault and partly by the fault of Dale, then the appellant can rely on the Law Reform (Contributory Negligence) Act, 1945. To determine what caused an accident from the point of view of legal liability is a most difficult task. If there is any valid logical or scientific theory of causation it is quite irrelevant in this connection. In a court of law this question must be decided as a properly instructed and reasonable jury would decide it. "A jury would not have profited by a direction "couched in the language of logicians, and expounding theories "of causation, with or without the aid of Latin maxims": *Grant* v. *Sun Shipping Co. Ld.*,[7] *per* Lord du Parcq. The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally. It may often be dangerous to apply to this kind of case tests which have been used in traffic accidents by land or sea, but in this case I think it useful to adopt phrases from Lord Birkenhead's speech in *Admiralty Commissioners* v. *Volute* (*Owners*),[8] and to ask was Dale's fault "so much mixed up with the state of things "brought about" by Stapley that "in the ordinary plain common

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[7] [1948] A.C. 549, 564; [1948] 2 All E.R. 238.

[8] [1922] 1 A.C. 129, 144, 145.

"sense of this business" it must be regarded as having contributed to the accident. I can only say that I think it was and that there was no "sufficient separation of time, place or circumstance" between them to justify its being excluded. Dale's fault was one of omission rather than commission, and it may often be impossible to say that, if a man had done what he omitted to do, the accident would certainly have been prevented. It is enough, in my judgment, if there is a sufficiently high degree of probability that the accident would have been prevented. I have already stated my view of the probabilities in this case, and I think that it must lead to the conclusion that Dale's fault ought to be regarded as having contributed to the accident.

Finally, it is necessary to apply the Law Reform (Contributory Negligence) Act, 1945. Sellers J. reduced the damages by one-half, holding both parties equally to blame. Normally one would not disturb such an award, but Sellers J. does not appear to have taken into account the fact that Stapley deliberately and culpably entered the stope. By doing so it appears to me that he contributed to the accident much more directly than Dale. The Act directs that the damages "shall be reduced to such extent as the court "thinks just and equitable having regard to the claimant's share in "the responsibility for the damage" (section 1 (1)). A court must deal broadly with the problem of apportionment and in considering what is just and equitable must have regard to the blameworthiness of each party, but "the claimant's share in the responsibility "for the damage" cannot, I think, be assessed without considering the relative importance of his acts in causing the damage apart from his blameworthiness. It may be that in this case Dale was not much less to blame than Stapley, but Stapley's conduct in entering the stope contributed more immediately to the accident than anything that Dale did or failed to do. I agree with your Lordships that in all the circumstances it is proper in this case to reduce the damages by 80 per cent. and to award 20 per cent. of the damages to the appellant.

I have not dealt with the question whether at the time of the accident the respondents were in breach of regulation 7 (3) of the Metalliferous Mines General Regulations because, whichever way that question were decided, it would not in this case affect my view as to the amount by which the damages should be reduced.

LORD TUCKER. My Lords, I need not repeat the facts as found by the learned judge. It will, I think, tend to simplify the case if

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these facts in relation to their causal effect are considered irrespective of the accidental circumstances as to which of the actors happens to be, or to be regarded as standing in the position of, plaintiff or defendant in the action. Two men, named Stapley and Dale, disobeyed the lawful instruction of their foreman Church "to bring down the roof" of the stope. It is common ground that this instruction meant and was understood to mean that they were to bring it down by the use of a pick or pinch bar or, if either of these methods failed or was impracticable, to bore holes and get the shot-firer to blast it down. Failing all these methods their duty was to report the matter to Church. Having tried for about half an hour to get the roof down with a pick they did not adopt any of the other methods or report to Church. The result was the roof remained insecure and dangerous and if anyone entered the stope in that condition an accident was liable to occur. Someone did enter and an accident did occur.

My Lords, I cannot avoid the conclusion that the failure of these men to carry out their instructions was a contributory cause of the accident.

In *Admiralty Commissioners* v. *Volute (Owners)*,[9] Viscount Birkenhead L.C. said: "Upon the whole I think that the "question of contributory negligence must be dealt with some-"what broadly and upon common-sense principles as a jury "would probably deal with it. And while no doubt, where a "clear line can be drawn, the subsequent negligence is the only "one to look to, there are cases in which the two acts come so "closely together, and the second act of negligence is so much "mixed up with the state of things brought about by the first "act, that the party secondly negligent, while not held free from "blame under the *Bywell Castle* [10] rule, might, on the other "hand, invoke the prior negligence as being part of the cause of "the collision so as to make it a case of contribution." Towards the conclusion of his speech he observed [11]: "The *Volute*, in the "ordinary plain common sense of this business, having contri-"buted to the accident, it would be right for your Lordships to "hold both vessels to blame for the collision."

In this connexion I venture to quote a passage from a recent judgment of the Privy Council in the case of *Sigurdson* v. *British Columbia Electric Railway Co. Ld.*,[12] because it was the judgment of the Board including Lords Simon, Normand and Oaksey although it was delivered by me. After referring to the above-quoted passages from *The Volute*,[13] the judgment proceeded[14]: "This was an Admiralty case, but now that "common law courts have to apply the same principles to "cases of collisions on land it seems to their Lordships "that this language will be found particularly suited to the "exposition to a jury of the principles which they have to apply "in these cases, and is much to be preferred to attempts to "classify acts in relation to one another with reference to time "or with regard to the knowledge of one party at a particular "moment of the negligence of the other party and his apprecia- "tion of the resulting danger, and by such tests to create "categories in some of which one party is solely liable and others "in which both parties are liable. Time and knowledge may "often be decisive factors, but it is for the jury or other tribunal "of fact to decide whether in any particular case the existence "of one of these factors results or does not result in the ascer- "tainment of that clear line to which Viscount Birkenhead "referred—moreover, their Lordships do not read him as "intending to lay down that the existence of 'subsequent' "negligence will alone enable that clear line to be found."

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[9] [1922] 1 A.C. 129, 144, 145.

[10] (1879) 4 P.D. 219.

[11] [1922] 1 A.C. 129, 145.

[12] Ante, 291.

My Lords, in the present case the negligence of Stapley in going into the stope seems to me to be "so mixed up with" the negligence of Dale and himself in not obeying their instructions that it cannot be regarded as an independent act unrelated to and distinct from their disobedience so as to make it the sole "real" or "effective" cause of the accident. The decision in these cases is one of fact and degree, and I see no reason for rejecting the conclusion arrived at by Sellers J. on this issue. If your Lordships were compelled as a matter of law to hold otherwise, it would appear that no relief is afforded by the Law Reform (Contributory Negligence) Act, 1945, in a great number of cases under the Factories Act, where employers are in breach of their obligation to fence but an operative has been negligent in working at an unfenced machine.

My Lords, so far as causation is in question it can make no difference whether Stapley or Dale was the person injured, nor can it matter whether Stapley was one of two, or one of a hundred men who acted in disobedience to the order. Each of them was guilty of a separate and independent act of negligence and breach of statutory duty which was a contributory cause of the accident. It is admitted that in acting as he did Dale was in breach of regulations 15 (1) and 15 (10). On the facts of this case these breaches clearly also constituted negligence at common law for which the respondents are responsible. As to the proper proportion of responsibility to be attributed to them, the learned judge does not appear to me to have given sufficient weight to the important fact that it was Stapley alone who entered the dangerous stope. Dale and Stapley were no doubt equally at fault up to that stage, but then Stapley alone acted in contravention of regulation 7 (3) by entering and working in the stope which had not been made secure. He must, I think, consequently bear a much larger share of responsibility than the respondents. I agree to the proposed proportions of 80 per cent. and 20 per cent.

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[13] [1922] 1 A.C. 129, 144, 145.

[14] Ante, 291, 299.

On this view of the case I have not found it necessary to decide whether the respondents were in breach of their duty under section 23 of the Metalliferous Mines Regulations Act, 1872, and regulation 7 (3) of the general regulations made under that Act, because on any view it would not affect my conclusion on liability or the proportions of responsibility indicated above.

I desire to reserve for future consideration, if and when it arises, whether the result would be different if Dale's acts or omissions had not amounted to negligence but had only been breaches of statutory duties imposed upon him personally.

For the reasons stated I would allow the appeal and assess the damages recoverable by the appellant at the sum of £605. I agree to the order proposed as to costs.

LORD ASQUITH OF BISHOPSTONE. My Lords, I agree that if, as the majority of your Lordships hold, contributory negligence by the company is established and therefore a question of apportionment arises, the plaintiff should not recover more than 20 per cent. of the damage. I find myself, however, unfortunately in disagreement with the majority of your Lordships in so far as you hold that any contributory negligence has been proved, and wish to record, briefly and with respect, my reasons for concurring with the conclusions on this issue of my noble and learned friend, Lord Porter.

There was in this case, in my opinion, no breach by the company, by itself or any servant or agent, of the Metalliferous Mines Regulations (S.R. & O. 1938, No. 630), made under section 86 of the Coal Mines Act, 1911. The company carried out its obligations under regulation 7 (3) to the letter, if the first line and a half of that regulation be read with the last two and a half lines.

If the company detail X and Y to repair a defect in the walls or roof to restore safety, they cannot possibly, it seems to me, be told that they are breaking the regulation by permitting the repairers to work in a working place which, pending the completion of the repair, is insecure. It was further suggested that the company were guilty of a breach of regulation 15 (1). This is a regulation binding on the employee only. It binds him to comply with " such directions concerning safety and discipline as may " be given to him by those in authority over him." It was, however, argued that a breach of this regulation by the employee was a breach by the mineowner, on the principle of respondeat superior, which is now disencumbered from the fetters of the doctrine of common employment. This argument, in my view, also fails, so far as it is based on the regulations, since regulation 14 (1) defines the extent to which the mineowners are to be liable for the failure of their employees to carry out the provisions of the regulations and provides that the company need only " enforce the observance thereof " " *to the best of* [*its*] *power.*" This it clearly did, on the facts of the present case.

The regulations were, in my view, complied with, and I only mention them because a very large percentage of the argument was devoted to their supposed breach and its consequences.

But, it is said, the matter does not rest on the regulations. Over and above them, and unimpaired by them, there is the common law liability of the employers to use all due care for the safety of their employees; this duty, the argument runs, was infringed when Dale, an employee of the owners, acting within the course of his employment, failed to carry out the instructions of Church, the foreman, and this, it is said, was a contributory cause of Stapley's death.

That Dale was in breach of his duty seems to me undeniable. He, like Stapley, was told (1) to bring down the roof of the dangerous stope; (2) not to work on the stope till the roof had been brought down. Stapley violated both of these injunctions. Dale violated only the first. Of the three well-recognized methods of bringing the roof down, one—that of fetching the shot-firer and getting it blasted down—he failed to employ, and was a consenting party to an arrangement whereby each of them, he and Stapley, should proceed with their respective normal tasks, without that method having been first resorted to.

Let it be assumed, therefore, that Dale was guilty of a negligent act committed within the course of his employment. Does it follow, as the morrow does the day, that Dale's omission (the negligence of Stapley's act being undisputed) was negligence in part causing the mishap to Stapley?

In my view it does not. The Court of Appeal has held the same. Like my noble friend, Lord Porter, I am not confident that I can wholeheartedly subscribe to the ground on which Birkett L.J. based his conclusion in this sense. He seems to say that since Stapley's negligent act in resuming work at the dangerous stope with the roof still intact was sufficient in itself to cause the disaster, without assistance from any positive negligent act by Dale, ergo, the court need not take into account the fact that, if Dale had done his duty, the consequences of Stapley's breach of duty might have been averted, and that in this sense Dale's omission may have been a contributory cause of the accident.

While I feel, with great respect, doubt about the validity of this reasoning, I consider that the conclusion of the Lords Justices can and should be supported on a different ground.

Courts of law must accept the fact that the philosophic doctrine of causation and the juridical doctrine of responsibility for the consequences of a negligent act diverge. To a philosopher —a term which I use in no disparaging sense, for what is a philosopher but one who, inter alia, reasons severely and with precision?—to a philosopher, the whole legal doctrine of responsibility must seem anomalous. To him, if event C could not occur unless each of two previous events—A and B—had preceded it, it would be unmeaning to say that A was more responsible for the occurrence of C than was B, or that B was more responsible for its occurrence than was A. The whole modern doctrine of contributory negligence, however, proceeds on the contrary assumption. If not there would be no question of apportionment. But the fission between law and strict logic goes deeper than that. For I am persuaded that it is still part of the law of this country that two causes may both be necessary pre-conditions of a particular result—damage to X—yet the one may, if the facts justify that conclusion, be treated as the real, substantial, direct or effective cause, and the other dismissed as at best a causa sine qua non and ignored for purposes of legal liability. This is a doctrine affirmed by your Lordships' House, and not, in my view, displaced by the Law Reform (Contributory Negligence) Act, 1945. On the contrary, the words " as the result of " in section 1 of that statute impliedly preserve the doctrine, the assertion of which your Lordships have more than once coupled with an admonition that, if the conditions for its application occur, a judge sitting alone should assume the mantle and the mentality of a jury, and should take what is called a " broad common-sense view," in deciding whether one of the causes (there may be two or twenty) is the " real " cause.

Approaching the matter from this angle, I have hardly any doubt that a jury would have said that the real cause of this mishap was Stapley's resumption of work at the perilous place without the roof having been brought down. While no doubt they would have realized that if Dale had acted in conformity with his duty this result *might* have been averted—it is a pure speculation whether it would or not—yet I am satisfied that they would have said Stapley's act was the real and substantial cause. His resumption of work, in the circumstances, was the crossing of the legal Rubicon. For that reason I agree with my noble friend, Lord Porter, that the appeal should be dismissed. But, as a majority of your Lordships are of a contrary opinion, I repeat that I think 20 per cent. is a reasonable percentage for the widow to recover.

Appeal allowed.

Solicitors: *Rowley Ashworth & Co.*; *Blyth, Dutton, Wright & Bennett for Menneer, Idle & Brackett, St. Leonards-on-Sea.*

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FACTORY — *Floor — Maintenance—Flooding of factory floors by exceptional rainfall—Gangway slippery with mixture of water and escaped oil—Workman allowed to work there —Injury—No negligence—No breach of duty to maintain gangway—Meaning of " maintain "—Factories Act*, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *ss.* 25 (1), 26.
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2. —— *Polish Government in London from* 1940 *to* 1945—*New Polish Government constituted at Lublin on June* 28, 1945—*Recognition of new Polish Government by British Government as from midnight July* 5–6, 1945 —*Terms of certificate of recognition—Retroactivity—No de facto control over Polish ships and men in England by new Polish Government.*
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2. ——. See Singapore—Mixed marriage.

MAURITIUS—*Sugar industry—Extraction—Payment to planters—Jurisdiction of Arbitration and Control Board—Certiorari and mandamus—Sale of Canes (Control) Ordinance, No.* 47 *of* 1941, *ss.* 6 (1) (2), 15, 21.

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Stapley *v.* Gypsum Mines Ld. **H.L.(E.) 663**

2. —— *Safe system of work—Window-cleaning—Defective window—Injury to window-cleaner—Lack of precautions—Employers' liability.*

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3. ——. See Canada (British Columbia).

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REVENUE—*Estate duty—Property deemed to pass—Settlement—Policies on settlor's life purchased by settlement trustees—Payment of premiums out of trust income—Death of settlor—Cesser of interest—Accrual of benefits to tenant for life and remainderman—Finance Act*, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 2 (1) (*b*); *s.* 7 (7).

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2. —— *Estate duty—Property passing on death—Policy of life assurance—Claim for estate duty on value of policy—Whether an interest provided by deceased—Whether any beneficial interest arose on death of deceased—"Donee"—Meaning—Finance Act*, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 2 (1) (*d*).

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3. —— *Income tax—Assessments on "excess rents" in case of "short leases"—Loss on other properties held on short leases and only in some cases re-let—Claim to deduction or set-off—"Transaction"—"Profits"—"Excess"—Income Tax Act*, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Case VI—Finance Act*, 1927 (17 *&* 18 *Geo.* 5, *c.* 10), *s.* 27 (1)—*Finance Act*, 1940 (3 *&* 4 *Geo.* 6, *c.* 29), *s.* 15 (1).

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4. —— *Income tax — Charity — Police athletic association—Profits of annual sports meeting—"Established for charitable purposes only"—Appeal from Special Commissioners—Jurisdiction of Court of Session—Finance Act*, 1921 (11 *&* 12 *Geo.* 5, *c.* 32), *s.* 30 (1) (*c*), (3)—*Finance Act*, 1925 (15 *&* 16 *Geo.* 5, *c.* 36), *s.* 19—*Finance Act*, 1927 (17 *&* 18 *Geo.* 5, *c.* 10), *s.* 24.

Inland Revenue Commissioners *v.* City of Glasgow Police Athletic Association **H.L.(Sc.) 380**

5. —— *Income tax—Employment—Agreement made abroad—Employment exercised in United Kingdom—Remuneration payable abroad—Assessment—Income Tax Act*, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Cases II, V; Sch. E.*

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6. —— *Income tax—Infant's savings bank account—Gift by father—"Settlement"—Interest as income of settlor—Finance Act*, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 34), *s.* 21.

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7. —— *Profits tax—Residence—Companies resident both in United Kingdom and abroad—Whether "ordinarily resident outside the United Kingdom"—Test of dual residence—Control and management—Finance Act*, 1947 (10 *&* 11 *Geo.* 6, *c.* 35), *s.* 39 (1).

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2. ——*Mixed marriage—Non-Christians—Modified Chinese form of marriage ceremony—Validity—Common law monogamous marriage.*
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2. —— *Land—Claim to declaration of title—Proof by traditional evidence—Point of law not taken below—Exception to rule as to concurrent findings of fact.*
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3. —— *Native customary law—Arbitration—Right to resile—Enforcement of award—Powers of Native Court "B"—Native Courts (Colony) Procedure Regulations, No.* 10 *of* 1945, *reg.* 40.
Native Appeal Court—Appellate jurisdiction only—Competently created—Native Courts (Colony) Ordinance, No. 22 *of* 1944, *s.* 3.
Opanin Asong Kwasi *v.* Joseph Richard Obnadabang Larbi - - - - **J.C. 164**